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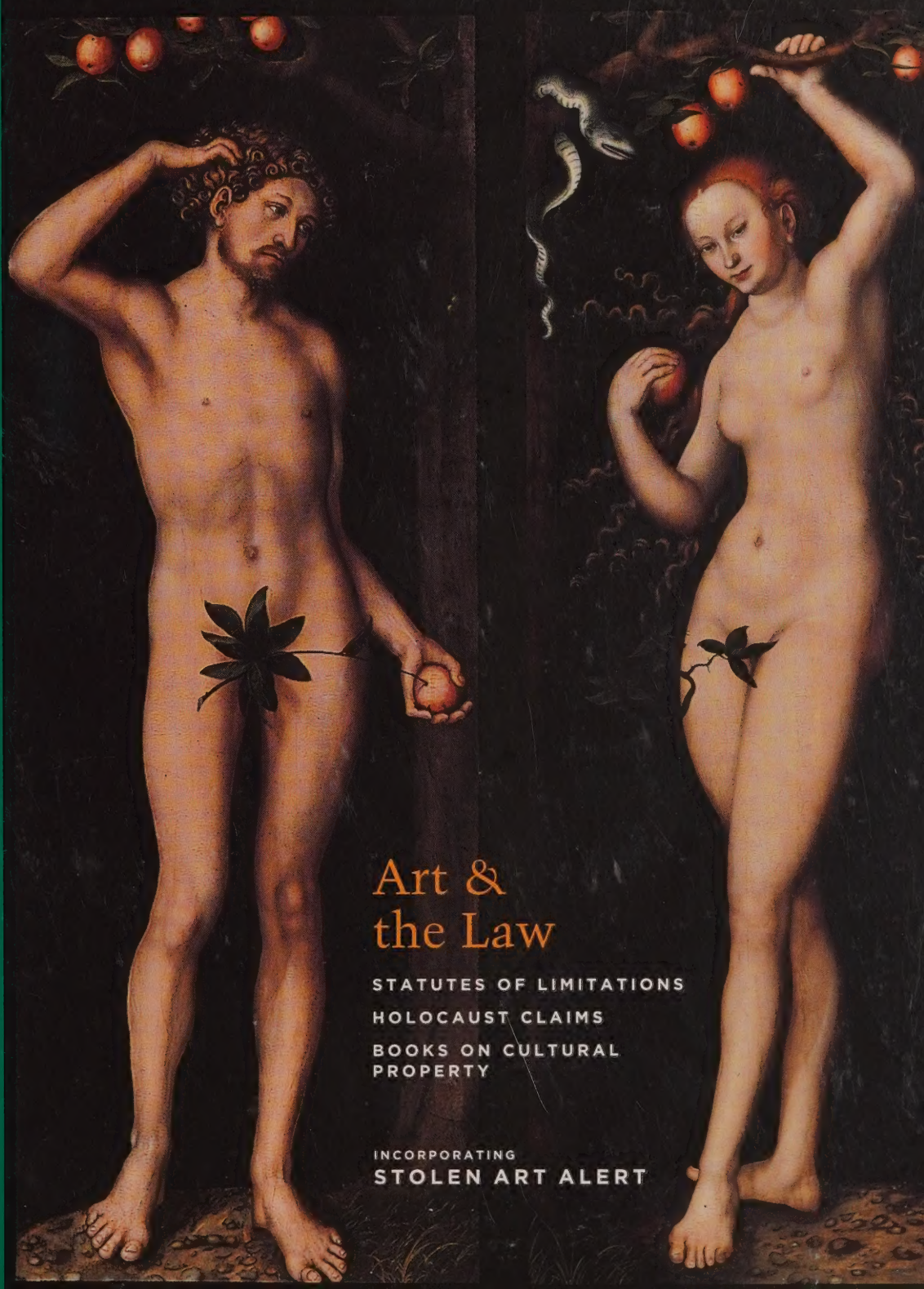

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IFAR Journal
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COVER: LUCAS CRANACH THE ELDER, *Adam and Eve,* c.1530, Both oil on panel, 75" x 27 ½".
Collection of the Norton Simon Art Foundation. See discussion on p. 21.

REMBRANDT LAUGHING:
A Forgotten Painting Comes to Light

In June of this year, the public learned of the reappearance of a long-lost, largely unknown self-portrait by Rembrandt **(FIG. 1).** The painting, which had been in a private English collection for the past one hundred years, resurfaced in October 2007 at a provincial auction house (Moore, Allen and Innocent) in Gloustershire, England.[1] The auctioneer, Philip Allwood, claims that from the beginning he believed that the work might be by Rembrandt, even though the seller informed him that when his father attempted to have the work authenticated, he was told that it was not. The auction house sought the opinion of the curators of the Rijksmuseum, who were uncertain whether the work was by Rembrandt or a seventeenth-century imitator. The English auctioneers reproduced the painting on the cover of the catalogue, attributing it to a follower of Rembrandt and assigning a pre-auction estimate of only £1,000-5,000. Several bidders in the room knew better.

After a brief, intense round of bidding, the painting sold for £2.2 million ($4.5 million USD) to an unnamed British collector, rumored to be John Morton Morris of the London gallery Hazlitt, Gooden & Fox.[2] It is clear that the word had gotten out among dealers of Dutch art that the painting might just be the real thing. Among the reported under bidders were the Manhattan dealer, Otto Naumann and the London-based dealer, Johnny van Haeften.

According to the Associated Press, William Noortman, Director of Noortman Master Paintings, speculated that if the work was an original by Rembrandt, it would be worth between $30 and $40 million. However, the London based Old Masters dealer Bob Haboldt gave a more conservative estimate of about $8 million.

FIGURE 1. REMBRANDT, ***Rembrandt Laughing.*** **Oil on copper, 22.2 x 17.1 cm. Private Collection.**

The painting, a small (22.2 x 17.1 cm) oil on copper, depicts the young Rembrandt three-quarter length with his right arm behind his back, and his head thrown back in laughter, wearing a riveted metal gorget. The English auctioneers called the painting *The Young Rembrandt as the Laughing Democrates* based upon a later pen inscription on the back of the painting identifying the subject as the ancient philosopher Democritus, sometimes called the 'laughing philosopher'. The subject was popular among seventeenth-century artists including Rubens and Moreelse, and often formed a pair with the 'weeping philosopher', Heraclitus. Rembrandt frequently depicted himself in fanciful garb in a wide array of characters.

> "The English auctioneers...assign[ed] a pre-auction estimate of only £1,000-5,000... The painting sold for £2.2 million."

Such works are not self-portraits, per se, but fancy heads called *tronies,* whose purpose is the depiction of different emotional states or character types. Indeed, although the figure in *Rembrandt Laughing* displays

1 Moore, Allen and Innocent, Cirencester, Gloustershire, October 26, 2007, lot. 377.

2 "A Rembrandt, Really," *The New York Times,* June 20, 2008. Hazlitt, Gooden & Fox could not be reached for comment.

several of Rembrandt's distinctive features, including wavy hair, bulbous nose and broad face, the artist sacrifices verisimilitude in an attempt to capture the fleeting effects of a momentary expression. Such works were often academic exercises, derived from the Italian interest in depicting the *affetti*, and were frequently copied by students as character studies.

"Although it was initially hailed as a new discovery, the work was not previously unknown...Rembrandt scholars knew of its existence through a print..."

Although the painting was already well-known among Rembrandt scholars and dealers of Dutch art following the October 2007 sale, the rest of the world was alerted to its presence when Ernst van de Wetering, Director of the Rembrandt Research Project (RRP), an ambitious Dutch project established in 1969 to catalogue the corpus of Rembrandt's authentic output, published an article in the *Kroniek van het Rembranthuis* declaring the painting to be a self-portrait by Rembrandt from his early years in Leiden.[3]

The authentication of *Rembrandt Laughing* by the RRP continues a trend towards greater inclusiveness in defining Rembrandt's *oeuvre*. During its first thirty years, the RRP applied notoriously rigid standards in ascribing paintings to the "A" category of authentic works, relegating many popular, previously accepted works to the "B" or "C" categories of "doubtful" or "rejected" works. Since 1993, when van de Wetering assumed its direction, the RRP has reevaluated some of its earlier negative opinions. The newly re-discovered *Rembrandt Laughing* joins several previously rejected works, including a 1642 *Self-Portrait* in a Private Collection, *La Main Chaude* in the National Gallery of Ireland, and *Rembrandt in a Flat Cap* from the Royal

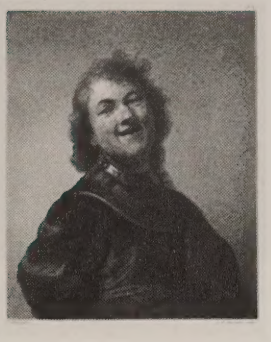

FIGURE 2. LAMBERTUS ANTONIUS CLAESSENS. **Reproductive print after the painting *Rembrandt Laughing*.**

Collection, in the canon of Rembrandt's accepted works.[4] In the *Kroniek* article, van de Wetering discusses the RRP's methodological approach. He argues that a Rembrandt attribution for the *Rembrandt Laughing* rests upon the diversity of evidence in favor of the attribution.[5] The RRP employs art historical research, technical examination and traditional connoisseurship when weighing an attribution to Rembrandt. In the case of *Rembrandt Laughing*, van de Wetering investigated all three avenues of research in making his determination.

ART HISTORICAL EVIDENCE

Although the painting was initially hailed as a new discovery, the work was not previously unknown. As van de Wetering points out, Rembrandt scholars knew of its existence through a print by Lambertus Antonius Claessens (1763–1834), who misattributed the original painting on which he based his print to Frans Hals **(FIG. 2)**. Later scholars identified the print as derived from a lost Rembrandt original. In 1905, Ernst Wilhelm

[3] Ernst van de Wetering, "Rembrandt Laughing, c. 1628-a Painting Resurfaces," *Kroniek van het Rembrandthuis* (2007), pp. 19-40. The 2007 *Kroniek* was published in June 2008.

[4] Gertrude Wilmers, "Two New Rembrandts Admitted to Canon," *IFAR Journal* Vol. 5, no. 4 (2002/03), pp. 8-10; and Ernst van de Wetering and Paul Broekhoff, "New Directions in the Rembrandt Research Project, Part I: The 1642 Self-Portrait in the Royal Collection," *Burlington Magazine* 138 (1996), pp. 174–80.

[5] He notes that the RRP's methodology follows the probability theories of Thomas Bayes (1702–1761) who believed that "a variety of evidence provides better confirmation than an equal amount of homogeneous evidence." Van de Wetering, p. 23.

FIGURE 3. Detail showing the artist's monogram "RHL" in raking light.

Moes cited the source of the print as a self-portrait by Rembrandt dated about 1629. This attribution was accepted by Kurt Bauch who included the lost painting in his 1966 monograph.[6] Nevertheless, the Rembrandt Research Project overlooked the significance of the print, and omitted mention of the lost original in *A Corpus of Rembrandt Paintings,* Volume 4 (2005), dedicated to Rembrandt's self-portraits.[7] Instead, the print was reproduced in Volume 1 (1983), cataloguing works from Rembrandt's early years in Leiden, in connection with a "free variant" (possibly Rothschild Collection) of the present painting.[8] It is unclear whether the newly accepted work will be discussed in the fifth volume, which will cover "'small-scale' history paintings and landscapes from 1642–69, with recapitulations of earlier works where necessary."[9]

TECHNICAL INVESTIGATIONS

To confirm its attribution, the successful auction bidders had *Rembrandt Laughing* cleaned and restored by the restorer Simon Howell. It was then subjected to technical examinations recommended by RRP researchers and carried out under the direction of Dr. Nicholas Eastaugh in London, who published his findings in the appendix of van de Wetering's article in the *Kroniek*. An examination of the copper support revealed that it was nearly identical in size to a lost etching plate used for Rembrandt's *Sts. Peter and John at the Temple Gate* from about 1628.[10] Similar plates were also employed by Rembrandt's students, but van de Wetering argues that those of student production tended to be of poorer quality than the copper plate of the present work.[11] Although the RRP determined that the plate was not a reused etching, a combination of electron emission radiography and infrared radiography, used to reveal the upper layers of paint separate from the ground, uncovered the presence of an earlier composition beneath the laughing *tronie*. Van de Wetering argues that it was common for Rembrandt to paint over earlier compositions with self-portraits, and notes that the visible elements in the underpainting, including a dagger, sword, and kneeling figures, are commonly found in Rembrandt's small history paintings.[12]

"A close examination...revealed the intertwined letters "RHL"... The English auction house had misread the monogram as "HL", which contributed to the misattribution..."

STYLISTIC ANALYSIS

With the advent of the RRP as the definitive arbiter in Rembrandt authentication research, it is perhaps surprising that collectors were willing to purchase the painting without the corroboration of the catalogue raisonné committee. However, van de Wetering notes that the extraordinary artistic quality of *Rembrandt Laughing*

6 Ibid., pp. 19-20.

7 The first four volumes of *A Corpus of Rembrandt Paintings* have been published to date. The first three volumes are arranged chronologically, and cover the period 1625-1642. Subsequent volumes are organized by subject. Volume 4 covers Rembrandt's self-portraits.Volume 5 on the small history paintings, will be published in 2010.

8 Van de Wetering, p. 20.

9 Ernst van de Wetering, "Thirty Years of the Rembrandt Research Project: The Tension Between Science and Connoisseurship in Authenticating Art," *IFAR Journal,* Vol. 4, no. 2 (2001), p. 15.

10 Members of the RRP initially investigated the possibility that the copper support was the reused plate of the unsuccessful *Peter and John* etching, although this theory was eventually ruled out. See van de Wetering, 2007, p. 27.

11 Van de Wetering cites a nearly identical painting of unknown subject, attributed to Gerrit Dou in the Bridgestone Museum of Art, Tokyo. However, x-radiographs reveal that the copper plate of the Tokyo painting was hammered thinner than the copper plate of the present work. Ibid.

12 Ibid., p. 28.

is evident even in a photograph. Close up, the painting "reveals Rembrandt's hand with its complex and intelligent differentiation in the handling of the paint; it displays the effectiveness, sureness of touch and looseness typical of his manner of painting throughout his life."[13]

This assessment of the painting's quality is supported by the presence of a rare monogram signature on the top left corner of the painting. A close examination of the signature in raking light revealed the intertwined letters "RHL" (Rembrant Harmenszoon Leydensis) painted wet-in-wet into the original paint layer **(FIG. 3)**. The English auction house had misread the monogram as "HL", which contributed to the misattribution of the painting to an imitator. Van de Wetering identifies the signature as a rare monogram used by the artist between 1627–1629, leading him to date *Rembrandt Laughing* to 1628, an important "searching" phase of Rembrandt's career when he was experimenting with the basic fundamentals or "grounds" of painting.[14] However, the stylistic maturity of the painting is closer to the master's works from the early 1630s than the late 1620s, his early Leiden period. Van de Wetering admits that the presence of certain characteristic features of Rembrandt's paintings after 1631, notably his use of a neutral background, and idiosyncratic method of painting toward the figure (instead of away from the figure toward the edge), led to initial confusion regarding the dating of the work. Much of the painting's art historical significance within Rembrandt's *oeuvre* lies in the early dating of the work as a prefiguration of the artist's mature style.

By contrast, Walter Liedtke, Curator of Dutch and Flemish Paintings at The Metropolitan Museum of Art and co-curator of the Met's 1995 exhibition "Rembrandt/ Not Rembrandt," cautions against ascribing an early date to the painting based solely upon the appearance of the signature. He argues that the monogram is similar to that found on other works painted by Rembrandt between 1627–31, noting that the style of the painting is more consistent with the later date.[15] In a criticism that seems leveled at the authentication methodology of the RRP in general, Liedtke notes that van de Wetering sets up an abstract system for determining authenticity, in which non-conforming works are regarded as "deviations rather than contradictions."[16] Thus, in the present case, while van de Wetering views the inconsistency between the early signature type and the maturity of the *Rembrandt Laughing* as a rare example of Rembrandt's experimental style, Liedtke views it as simply a representative example of his works from about 1629–1631.

Notwithstanding the controversy over its possible date and significance within the spectrum of Rembrandt's stylistic development, there seems to be agreement among scholars of Dutch art that *Rembrandt Laughing* is an important find as an authentic painting by the master. What is the most persuasive feature of *Rembrandt Laughing*? Liedtke says that the painting displays Rembrandt's fascination with the atmospheric and descriptive qualities of the various surface textures within the work, noting that "the naturalistic qualities of the painting captivate our attention and keep us looking."

The public was given a brief opportunity to judge *Rembrandt Laughing* for itself when the buyer lent it to the Rembrandthuis, Amsterdam in June of this year. After centuries in obscurity, it remains to be seen if this newly discovered treasure will enter a public collection or whether it will once again disappear from public view.

LISA DUFFY-ZEBALLOS
ART RESEARCH DIRECTOR, IFAR

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13 Ibid., p. 20

14 Ibid., p. 23.

15 In a conversation with this author, September 2008.

16 Liedtke has argued this point previously in defending the authenticity of another *tronie*, the Getty's *Man in a Gorget and Plumed Cap*. The RRP had assigned the painting to the "B" category of questionable attributions, in part based on the variance between the early monogram and the painting's mature style. Liedtke argued, "A light coat of varnish cannot colour one's vision so much as photographs and hypotheses do. Without the latter, scholars should have no difficulty placing the *Man in a Gorget* in a series of anxious old men painted by Rembrandt in 1630-31." Walter Liedtke, "Rembrandt's 'Man in a Gorget and Plumed Cap' in the J. Paul Getty Museum," *Burlington Magazine* 137 (July 1995), p. 462.

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IT'S 2008—DO YOU KNOW WHERE THE OWNERS ARE?

An Update on the Kingsland Case

If the life of art collector William M. V. Kingsland could fairly be described as enigmatic, the two years since his death would have to be labeled extraordinary, unpredictable, and dismaying. And the after-effects continue.

Kingsland—born Melvyn Kohn (although the "V" in his middle initials was said to stand for Vanderbilt)—died in New York in 2006 without leaving a will. His small Upper East Side apartment in Manhattan was crammed with art—an eclectic collection of more than 500 works valued at several million dollars. There were paintings by Lely, Copley, Balthus, Picasso, Morandi, and many other artists, famous and not-so-famous. In addition, there were sculptures—notably among them a Giacometti bronze *Tête de Diego* valued at about a million dollars **(FIG. 1)**—and numerous decorative objects: porcelains, bronze candlesticks, and the like. The absence of a will did not stop five self-described relatives (an uncle and four first-cousins) from coming forward.[1] Their respective claims will be determined by the court.

The Public Administrator of New York County took over, arranged for the art to be sold, and set about overseeing all claims. Several auction houses were considered to sell the collection. Christie's was selected; it chose the most important works for sale, and sent several hundred others to the Stair Galleries in Hudson, New York for a 2006/07 series of auctions. But the complications started piling up when these became not your run-of-the-mill estate auctions, and when Christie's provenance research began uncovering problems.

An unattributed painting entitled *Profile Portrait of a Gentleman*—which had slipped by Christie's usually more discerning eye—was given a Stairs' price estimate of $1,500-$2,500, and was then purchased for $85,000 by an astute New York dealer. The work turned out to be a John Singleton Copley portrait of the second Earl of Bessborough **(FIG. 2)** that had been reported missing by Harvard University in 1971. Harvard submitted a formal claim for the work. It also claimed a second portrait, that of a man, labeled by Stair Galleries as "English School: *Portrait of a Clergyman*." Once believed to be a work by Gilbert Stuart and now unattributed, the portrait actually shows John Thornton Kirkland, Harvard's president in the early nineteenth century. The University also laid claim to a painting by Childe Hassam. The Stairs' sales were temporarily halted and the "successful" bidders contacted and cautioned. The FBI was brought in.

FIGURE 1. ALBERTO GIACOMETTI, *Tête de Diego,* **bronze with black patina, ht. 14 inches. Found in Kingsland's collection, but several claimants have come forward.**

The problems, and the claims, did not end there. The Public Administrator is working to sort them out. A Morandi still-life **(FIG. 3)** sold in October 2006 by Christie's in London for $606,792 at a sale of Italian art turned out to have been stolen in 1967. There are competing claims for this painting.[2] Meantime, the

[1] See the Account of Executors and Administrators, Surrogate's Court of the State of New York, County of New York, File No. 1400-06. This is an accounting of the Public Administrator as administrator of the Estate of William Kingsland from March 21, 2006 through May 1, 2008.

[2] The Albert Loeb Gallery and the Krugier Galleries (both New York and Geneva) have laid claim, but an insurance company may also have an ownership interest. The work is alleged to have been stolen "during the course of [a] May 18-June 17, 1867 exhibition at the Albert Loeb & Krugier Gallery. … In 1967, Albert Loeb Gallery, Inc. was a joint venturer with Galerie Krugier & Cie. ... The joint venture dissolved some time after 1967." (*Ibid,* Schedule D, pp.3-4)

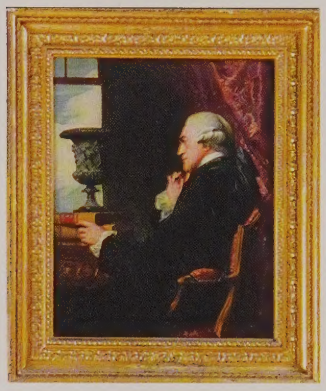

FIGURE 2. This Copley portrait from Kingsland's collection turned out to have been stolen from Harvard in 1971.

FIGURE 3. There are competing claims for this Giorgio Morandi, *Natura Morta*, from the Kingsland Collection, which was sold at Christie's, London in 2006 for $606,792. The work turns out to have been stolen in 1967.

Morandi sale was rescinded. The Giacometti bronze also appears to have been stolen and there are also competing claimants.[3] Plus, an insurance payment may have been made, in which case the insurer may have an ownership interest through subrogation.

In all, 18 works had been claimed as of late Spring 2008, including a Balthus, a Joseph Stella, a Redon, a Boudin, two works by Fairfield Porter, and two Picasso drawings (which, to add to the saga, were stolen during the investigation process by a mover, who has since been prosecuted. The drawings were stolen originally in the 1960s.). However, thus far, only five claims have been approved. Documentation is still being collected for the others. The Public Administrator told IFAR that "all of the claimants have been notified that they need to provide documentation of ownership"— the same process as with all other Public Administrator claims. Eventually, there will be hearings. None of the works, even those with approved claims, have as yet been returned. Most are being kept at Christie's; a few are being held by the FBI.

Curiously, two claims have come in for works for which there is no evidence that Kingsland ever owned—a Warhol silkscreen of Roy Lichtenstein and a Giacometti drawing.

It is not known how Kingsland acquired his collection —whether he was aware that some, if not all, of the works had been stolen, and whether he was involved in the thefts. Purchase records for the works have not been found among Kingsland's possessions. His various occupations—at an antiques shop and at an art gallery, and leading art and architecture tours—gave him easy access to artworks. Because so much time has elapsed since the suspected thefts, many of the individual victims may have died and the galleries may have gone out of business.

The FBI and The Public Administrator's office are publicizing the works in question to seek all potential claimants. In August, images of more than 100 works —including those that have been claimed—were posted on the FBI's Website.

Technically, the claim period has expired, but the Public Administrator's office told IFAR that "it is keeping the filing period open for now in order to get the word out to the public." But as the case "moves forward in Surrogate's Court, they will have to cut off the claim period."

[3] These include the Pierre Matisse Foundation, the Pierre and Maria Gaetana Matisse Foundation and Sotheby's. See *Ibid.*, Schedule D, p. 6.

In an effort to help the FBI and The Public Administrator, IFAR is publishing here some of the images. For more images, please see: http://www.fbi.gov/hq/cid/arttheft/northamerica/us/kingsland/kingsland.htm

If you recognize any works, or have any information about the provenance, acquisition, or ownership of any of these works, or want to make a claim, contact one of the following:

Special Agent, James Wynne, FBI
Telephone: (718) 286-7302 or email:
James.Wynne@ic.fbi.gov

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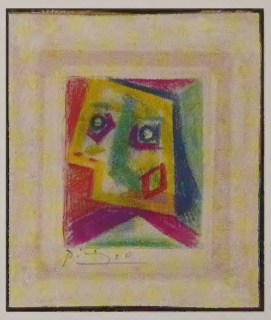

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THE GOOD FAITH OWNER AND THE TARDY HEIR:

Recent Cases Portend More Aggressive Defenses Against Holocaust-Era Art Claims

STEVEN ALAN REISS* AND JONATHAN BLOOM**

Restitution claims involving works of art allegedly stolen or otherwise lost as a result of Nazi persecution have become increasingly common. Most of these disputes involve works whose current owner, whether an individual or an institution, acquired the work in good faith years ago, unaware of its purported illicit past.

The circumstances giving rise to the claims vary widely: some are based on well documented thefts or forced sales,[1] while others are advanced without any evidence of Nazi involvement in the loss of the work or are based on an arguably legitimate sale alleged to have been made "under duress"—a potentially very broad term that courts are now being asked to construe.[2]

Holocaust art restitution claims can carry great moral weight, but such claims, no different than other legal claims, are not always valid. Indeed, the potentially huge sums of money the sale of a recovered masterwork can bring provides a powerful incentive to advance claims of dubious merit. While credible, documented claims for recovery of works confiscated by the Nazis may persuade the current owner to forego a valid legal or equitable defense, such as the statute of limitations, in favor of a settlement, claims that appear to be unfounded and/or abusive may justify a more aggressive strategy.

"Holocaust art restitution claims can carry great moral weight, but such claims, no different than other legal claims, are not always valid."

Specifically, where the current owner, after careful investigation and dialogue with the claimants, comes to believe that a restitution demand is not meritorious, and where the threat of litigation is clouding the title to the work and destroying its marketability, the option of commencing a declaratory judgment action to quiet title might be—and several recent cases indicate that it is increasingly being—considered. This can be a particularly attractive legal strategy if the facts set forth in the restitution demand reveal that the claim is barred by the applicable statute of limitations, which can allow the case to be resolved without the need to determine the precise circumstances of the work's loss or transfer decades earlier (which, given the passage of time, may be elusive). The statute of limitations also can be interposed as a defense to a replevin action (a civil claim for recovery of wrongfully taken personal property).

Reliance on the statute of limitations risks being characterized as use of a technicality to subvert justice. But justice is not always on the side of the Holocaust art claimant, nor is the statute of limitations properly understood as a technicality. Baseless art ownership

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Weil Gotshal represented Elizabeth Taylor in *Adler v. Taylor* and *Orkin v. Taylor* discussed in this article and cited below.

1 *See Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D. R.I. 2007) (granting summary judgment to estate of Dr. Max Stern, the original owner of a Franz Xaver Winterhalter painting that was liquidated for below market value in a 1937 forced sale of works from the Stern collection).

2 *See, e.g., Museum of Modern Art and the Solomon R. Guggenheim Found. v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (denying motion to dismiss declaratory judgment action brought by museums to quiet title to Picasso paintings alleged to have been sold under duress).

claims can inflict real economic and other harm on innocent owners, and, as such, should be defeated as expeditiously as possible. The statute of limitations can be a means of doing so. Moreover, the principal purposes of statutes of limitations—avoiding the prejudice of having to defend against stale claims and encouraging diligent pursuit of claims[3]—are important interests that are implicated by restitution claims arising out of the chaos of World War II Europe.

The strategy outlined above was first used successfully by the actress Elizabeth Taylor. In order to fend off what she believed was an unfounded and clearly untimely demand for return of a van Gogh landscape she had owned very publicly for nearly forty years, Taylor filed a declaratory judgment action in May 2004 in federal court in California in which she alleged, *inter alia*, expiration of the statute of limitations under California law. She also invoked the statute of limitations as a defense to a replevin claim subsequently filed in the same court by four asserted heirs of a former owner. The 2005 ruling by the district court granting Taylor's motion to dismiss the claimants' action on statute of limitations grounds,[4] which was affirmed on appeal,[5] was, as far as we know, the first case in which a Holocaust art restitution claim was resolved on the pleadings, with no fact discovery.

"Reliance on the statute of limitations risks being characterized as use of a technicality to subvert justice."

Taylor's strategy, which was predicated on her view that the demand had no legal or factual merit, was followed successfully by two U.S. museums—the Toledo Museum of Art and the Detroit Institute of Arts—that were confronted with demands by the heirs of Martha Nathan for the return of important Post-Impressionist paintings alleged to have been

FIGURE 1. VINCENT VAN GOGH, *Vue de l'Asile et de la Chapelle de Saint-Rémy*, 1889. Oil on canvas. 17 ½" x 23 ¾". California courts ruled in Elizabeth Taylor's favor in an ownership dispute over this work.

sold under duress, as discussed below.[6] More recently, the Museum of Modern Art and the Solomon R. Guggenheim Museum in New York jointly instituted a declaratory judgment action to quiet title to Picasso paintings in their collections that have been claimed by a descendant of Paul von Mendelssohn-Bartholdy.[7]

THE TAYLOR CASE

On April 24, 1963, Elizabeth Taylor, bidding through her art-dealer father Francis, purchased Van Gogh's *Vue de l'Asile et de la Chapelle de Saint-Rémy* of 1889 *(View of the Asylum and Chapel of Saint-Rémy)* **(FIG. 1)** for £92,000 at Sotheby's London auction of Impressionist and Post-Impressionist paintings from the estate of Alfred Wolf. The provenance in the sale catalogue indicated that the painting had passed from Margarete Mauthner (a Jewish resident of Berlin who fled to South Africa in 1939), to two reputable Jewish-owned art galleries in Berlin—that of Paul Cassirer (from whom Mauthner, one of the early German collectors of van Gogh, had purchased the painting in 1907) and Marcel Goldschmidt & Co. The painting then was acquired by Alfred Wolf, a Jewish industrial-

3 See, e.g., *New v. Armour Pharm. Co.*, 67 F.3d 716, 718-19 (9th Cir. 1995) (noting that two purposes of statute of limitations are protecting defendants so they can gather evidence while facts are still fresh and "motivating plaintiffs to diligently pursue their claims").

4 *Adler v. Taylor*, No. CV 04-8472-RGK (FMOX), 2005 WL 4658511 (C.D. Cal. Feb. 2, 2005).

5 *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007).

6 *Toledo Museum of Art v. Ullin ("Toledo Museum")*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); *Detroit Institute of Arts v. Ullin ("Detroit Institute")*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).

7 See *supra* note 2. Because of New York's demand-and-refusal accrual rule, the two museums could not assert expiration of the statute of limitations.

ist who lived in Stuttgart. Wolf fled Germany soon after the Nazis came to power, taking his family and his collections first to Switzerland and later to Buenos Aires (where the painting was exhibited in 1949).[8]

Taylor's acquisition of the painting made news on both sides of the Atlantic,[9] and her ownership of the painting during the following decades was hardly a secret. Examples of the public references to Taylor's ownership are the following: She was listed as the current owner in the 1970 catalogue raisonné of van Gogh paintings and drawings. The painting was included in the Metropolitan Museum of Art's November 1986-March 1987 blockbuster exhibition "Van Gogh in Saint-Rémy and Auvers" and was reproduced in the exhibition catalogue as well as in a *"New Art Book and Engagement Book"* published by the museum in connection with the exhibition—identified in each case as belonging to "Collection Elizabeth Taylor." The painting was offered for sale at Christie's in London in December 1990. That single-painting sale was the subject of major advance press coverage (it was front-page news in London),[10] and the scholarly sale catalogue listed Mauthner as a prior owner and included a photograph of Taylor posing with the painting (which did not sell). The painting also was included in the June-August 1991 Los Angeles County Museum of Art exhibition "Monet to Matisse: A Century of Art in France from Southern California Collections" and was reproduced in the catalogue of that show as well, which also identified Taylor as the owner.

In October 2002, nearly forty years after Taylor acquired the painting, counsel for four individuals (A. Heinrich Zille, Andrew J. Orkin, F. Mark Orkin, and Sarah-Rose Josepha Adler) who identified themselves as heirs of Margarete Mauthner notified Taylor of a possible claim to the painting, having heard by means of an Internet rumor that she was interested in selling it. After Taylor requested documentation of the claim, the heirs' counsel provided a lengthy memorandum in December 2003 with numerous exhibits that purported to set forth the legal and factual basis for a restitution claim. Legally, the claim was predicated principally on section 202 of the Holocaust Victims Redress Act of 1998 (the "Redress Act"),[11] a non-binding resolution entitled "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art." The claimants asserted that the Redress Act created a federal right for individuals to bring civil actions for the restitution of Holocaust-related art claims without being subject to state statutes of limitations.

"[Elizabeth] Taylor's strategy, which was predicated on her view that the demand had no legal or factual merit, was followed successfully by two U.S. museums—the Toledo Museum of Art and the Detroit Institute of Arts . . ."

The claimants' dossier included a wealth of information concerning the Mauthner family, the history of Nazi persecution of Germany's Jews, as well as the family's post-war restitution efforts relating to the forced sale of their home in Berlin and the loss of pension funds. The demand also noted that Mauthner was listed as owner of the painting in the 1928 and 1939 editions of the de la Faille van Gogh catalogue raisonné[12] and that Taylor was listed as the current owner in the 1970 edition. It also acknowledged publication of the painting in the 1990 Christie's catalogue. Notably missing, however, was any information either about how the painting was lost, other than the vague assertion that Mauthner was "forced to sell [the painting] before fleeing further persecution," or about prior attempts by any member of the family to locate or obtain restitution for the painting.

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8 Most of these facts, and those in the subsequent paragraphs, are recited in the Ninth Circuit's opinion. *See Taylor,* 487 F.3d at 737-38.

9 *See, e.g.,* "Liz Taylor's Father Buys Van Gogh Painting," *Washington Post,* Apr. 25, 1963, p. A16; "Sotheby's Sells Wolf Collection," *The New York Times,* Apr. 25, 1963, p. 30; "£92,000 Paid for Van Gogh View of Asylum," *Times (London),* Apr. 25, 1963, p. 17; "Art, Architecture and Engineering: A Camera Survey of Topical Home News," *Illustrated London News,* May 4, 1963, p. 689.

10 *See* "Liz Taylor to sell off Van Gogh's 'Asylum'," *Independent (London),* Nov. 5, 1990, p. 1; "Elizabeth Taylor to sell £8m Van Gogh," *Times (London),* Nov. 5, 1990, p. 1; "Liz selling her £10m Van Gogh," *Daily Express,* Nov. 5, 1990, p. 1. See also "Taylor Selling van Gogh," *The New York Times,* Nov. 5, 1990, p C13 (noting that the painting was being exhibited in Paris and would be exhibited in New York prior to the December 3 sale in London).

11 *Holocaust Victims Redress Act of 1998,* Pub. L. No. 105-158, 112 Stat. 15 (1998).

12 J.-B. de la Faille, *L'Oeuvre de Vincent van Gogh Catalogue Raisonné* (Paris et Bruxelles: Les Editions G. Van Oest 1928), cat. no. 803; J.-B. de la Faille, *Vincent van Gogh* (Paris: Hyperion Press 1939), cat. no. 803.

In fact, the demand acknowledged the absence of proof of a forced sale, maintaining that it "would be unreasonable to expect that these victims should always have retained or could retain documents recording the dispossession of the artworks and other property in Nazi Germany" and that "[t]he passage of time, the exigencies of flight as refugees, and conditions of war diminish the likelihood that claimants will be able to produce all the documents supporting their ownership that once may have existed." Instead, the claim rested on the assertion that the listing of Mauthner as the owner in the 1939 catalogue raisonné proved that she still owned the painting when she fled for South Africa (a claim seemingly inconsistent with her supposedly having been forced to sell it before leaving the country as well as questionable for failing to account for the inevitable time lag between compilation of the information and publication of the catalogue).

"... Taylor filed an action in the Central District of California seeking a declaration of rightful ownership in order to quiet title."

The claimants' passing reference to a forced sale as a result of Nazi persecution was puzzling given that the provenance information provided with the claimants' submission was generally consistent in indicating that the painting had passed from Mauthner through Goldschmidt to another prominent Jewish collector (Wolf), who himself (Taylor learned) had fled the Nazis, taking the painting with him. In short, there was no "red flag" concerning any Nazi role in Mauthner's "loss" of the painting.

In May 2004, after unproductive discussions with the heirs' counsel, and based on the conclusion that the claim was baseless as well as untimely, Taylor filed an action in the Central District of California seeking a declaration of rightful ownership in order to quiet title. The complaint alleged that the heirs' threatened claims were barred by the expiration of California's three-year statute of limitations on actions to recover personal property and by laches (unreasonable and prejudicial delay). In July 2004, Taylor filed an amended complaint, adding a claim that under English law she had acquired good title to the painting as of 1969 and alleging (based on, among other things, conversations with one son of Alfred Wolf and a published interview with another son) that Mauthner had sold, and Wolf had acquired, the painting in the late 1920s, several years before the Nazis came to power.

In October 2004, the heirs filed a motion to dismiss Taylor's action, arguing that it improperly pre-empted their right to bring a coercive restitution claim. They also filed a complaint against Taylor in the same court for specific recovery, replevin, constructive trust, restitution, and conversion, alleging that they were the rightful owners of the painting pursuant to the Redress Act and related federal legislation. Taylor moved to dismiss the complaint on the grounds that under the English law applicable at the time of the Sotheby's sale (the Limitation Act, 1939), title passed to Taylor six years after the 1963 sale and that the claim was barred by the California statute of limitations.

In opposing Taylor's motion to dismiss (and in an amended complaint), the heirs asserted that under an equitable discovery rule, the statute of limitations should be tolled (suspended) on the grounds that they had been reasonably diligent in pursuing their claims after passage of the Redress Act in 1998. That law, they asserted, first triggered awareness that they might have a valid claim. They alleged that the Redress Act created a private right of action for the recovery of Holocaust-era artwork and that the recently enacted California statute (Cal. Code Civ. Pro. § 354.3), which suspended the applicable statute of limitations and extended until 2010 the period for suing galleries and museums for the return of Holocaust-era artwork, reflected a legislative intent to extend the limitations period for actions against private individuals as well. They also stated, however, that they did not retain counsel to investigate a possible claim until 2001 and that they "did not learn that [Taylor] was in possession of a painting that they might be legally entitled to recover until approximately October 2002—when counsel discerned a rumor through the Internet that [Taylor] may have been interested in selling the Painting."

On February 2, 2005, Judge R. Gary Klausner granted Taylor's motion to dismiss and denied the heirs' motion to dismiss Taylor's declaratory judgment action. The court held that the heirs' claims were barred by the statute of limitations, that the Redress Act did not create a private right of action, and that the "findings and declarations" of the California legislature in passing section 354.3 did not relieve the heirs from the three-year statute of limitations.[13]

The court noted that California amended its statute of limitations in 1983 to provide that actions for recovery of personal property accrue upon discovery of the whereabouts of the property but that this case was governed by pre-amendment law because the alleged loss of the painting occurred prior to 1983. As to the pre-1983 accrual rule, the court concluded that the cause of action accrued when Taylor acquired the painting in 1963 and that the limitations period expired in 1966.[14]

The court also rejected the heirs' contention that their claims were governed by—and timely under—an "equitable discovery rule." Under an equitable discovery rule, a cause of action does not accrue until the plaintiff discovers, or by the exercise of reasonable diligence and intelligence should have discovered, the facts that form the basis of the claim. Even assuming the truth of the allegation that Mauthner lost the painting as a result of Nazi persecution, the court held that with reasonable diligence the heirs should have discovered Taylor's ownership of the painting in 1963 (the date of Taylor's purchase). The court noted that Mauthner's prior ownership and loss of the painting as well as Taylor's subsequent purchase and ownership of the painting were common knowledge and easily discoverable.[15]

The court also rejected the heirs' argument that section 354.3 applied to actions against private individuals, noting that on its face it applies only to claims against museums and galleries.[16]

Finally, the court addressed the heirs' novel claim that they had a federal cause of action under the Redress Act that was not subject to any statute of limitations. The Redress Act was passed to assist in the "restitution of assets seized by the United States Government during World War II which belongs to victims of the Holocaust, and for other purposes."[17] Section 202 of the Act expresses the "sense of Congress" that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner."[18] The court held that the Act does not indicate an intent on the part of Congress to create a private cause of action, but, rather, "indicates a congressional intent to encourage governments to aid in the restitution of property through currently existing laws."[19]

On appeal, the Ninth Circuit, in an opinion by Judge Sidney R. Thomas, unanimously affirmed. Starting with the heirs' federal claim based on the Redress Act, the court agreed with the district court that the Act did not create a private right of action.[20] It noted that the legislative intent behind the provision of the Redress Act on which the heirs' relied was "to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims" and that there was no indication of an intent to create a private right of action. The court stated that "[t]he plain text of the [Act] leaves little doubt that Congress did not intend to create a private right of action." "Sense of Congress" provisions, the court noted, "do not in themselves create individual rights or, for that matter, any enforceable law."[21]

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13 *Taylor*, 2005 WL 4658511, at *5-*6.

14 *Id.* at *4 (*citing, e.g., Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 780-83 (1996)).

15 *Id.* at *4-*5.

16 *Id.*

17 Pub. L. No. 105-158, 112 Stat. 15 (1998).

18 Redress Act § 202, 112 Stat. at 17-18.

19 *Taylor*, 2005 WL 4658511, at *5-*6. The court also rejected the heirs' argument that the findings and declarations of the California legislature indicated an intent to override the statute of limitations on claims to recover art claimed to have been lost during the Holocaust era. Id. at *6.

20 487 F.3d at 738-41.

21 *Id.*

Turning to the statute of limitations issue, the court addressed the heirs' new argument that under an intermediate California appellate decision, *Naftzger v. Am. Numismatic Soc'y*,[22] an "actual discovery" rule —one that does not take into account whether the cause of action reasonably could have been discovered earlier than it was—applied to their claims. Under that rule, the heirs' contended, their claim was timely, since it was brought within three years after they discovered in 2002 that Taylor possessed the painting.

Because the California Supreme Court had never opined on the applicable rule of accrual for pre-1983 causes of action for theft, the Ninth Circuit undertook to predict how the California high court would rule. It noted that the California Supreme Court has specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice. Therefore, the court concluded, it was unlikely that the California Supreme Court would adopt an "actual discovery" rule that eschewed the concept of constructive notice.[23] The court thus concluded that the heirs' claims accrued when they first reasonably could have discovered, through investigation of sources available to them, their claim to, and the whereabouts of, the painting.

As to these factual issues, the court held that it was apparent from the face of the heirs' amended complaint that Taylor's ownership was discoverable as early as 1963, when she acquired the painting at a public auction, and by 1970, when the catalogue raisonné listed Taylor as the current owner, and certainly by 1990, with the highly public attempted sale through Christie's. Thus, the court held, the heirs' claims were time-barred, at the latest, by 1993.[24] The heirs' petition for a writ of certiorari to the U.S. Supreme Court was denied on October 29, 2007.

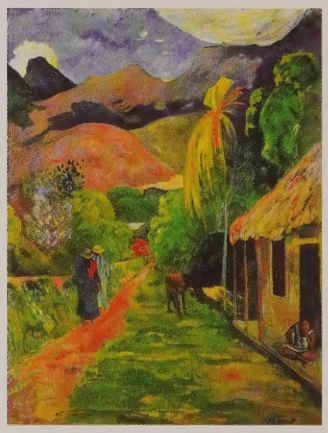

FIGURE 2. PAUL GAUGUIN, *Street in Tahiti*, **1891. Oil on canvas. 115.5 x 85.5 cm. Photo: Toledo Museum of Art. Access. no. 1939.82. Heirs of the painting's pre-WWII owner made a claim against the museum.**

THE TOLEDO AND DETROIT DECISIONS

Following the district court ruling in *Taylor,* two other district courts granted declaratory relief to current owners—both art museums—seeking to quiet title, based on expiration of the statute of limitations, to paintings alleged to have been sold under duress during the Nazi era. In these cases, too, the facts did not seem to support the claims.

The first case involved Paul Gauguin's *Street Scene in Tahiti,* **(FIG. 2)**, which the Toledo Museum of Art purchased from Georges Wildenstein for $25,000 in 1939. Wildenstein, along with two other Jewish art dealers, Justin Thannhauser and Alexander Ball, had purchased the painting in 1938 from Martha Nathan, the wife of prominent collector Hugo Nathan, who had inherited the painting and numerous other artworks upon Hugo's death. At least two of the dealers (Thannhauser and Ball) had known Nathan for many years.[25] Thannhauser and Ball were German Jews whose families owned art galleries that were liquidated by the Nazi government and who, like Nathan, had left Germany to escape Nazi persecution. Martha Nathan sold the Gauguin, then located in Basel, along with some other artwork, to the dealers a year and a half after she had fled from Nazi Germany to France and before the German occupation of France. After

[22] Cal. App. 4th 421, 428 n.4 (1996) (holding that under a pre-amendment versions of the statute, a cause of action to recover stolen property did not accrue until the plaintiff actually discovers the identity of the person in possession of the stolen property).

[23] 487 F.3d at 741 (*citing Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1109 (1988)).

[24] *Id.*

[25] *Toledo Museum*, 477 F. Supp. 2d at 804.

the war, Nathan (like the Mauthner family) successfully pursued restitution for wartime losses, including compensation for other paintings that she was forced to turn over to the Nazi regime, but she never pursued restitution for the Gauguin. The museum had displayed the painting since its purchase, with Martha Nathan listed as a prior owner.[26]

In 1999, pursuant to the American Association of Museums guidelines established to assist museums in addressing issues raised by artwork with Nazi-era provenances, the museum posted artwork with Nazi-era provenances, including the Nathan Gauguin, on its Website. In May 2004, Nathan's heirs, the Ullins, contacted the museum and asserted a claim to the painting. After investigating the painting's provenance and providing the heirs with the information it had collected, the museum rejected the claim.

In January 2006, the museum brought a declaratory judgment action in the Northern District of Ohio to quiet title to the painting. The Ullins filed a counterclaim for conversion, restitution, and a declaratory judgment. In response, the museum filed a motion to dismiss the heirs' counterclaims based on the statute of limitations and laches.

As a threshold matter, the court held (as had the *Taylor* district court) that a declaratory judgment was appropriate to "settle the controversy and clarify the legal rights of the parties."[27] As to the merits, the court granted the museum's motion to dismiss, holding that the heirs' claims were barred by Ohio's four-year statute of limitations for conversion of personal property.[28]

Under Ohio law a conversion claim accrues when the claimant discovers, or reasonably should have discovered, the complained-of injury.[29] The court held that if Nathan had believed she had a claim to the painting, she could have brought suit after the war, when she sought restitution and damages for other property

FIGURE 3. VINCENT VAN GOGH, *Les Becheurs (The Diggers)*, **1889. Oil on paper laid on canvas. 65.1 x 50.2 cm. Claimed by heirs of its pre-WWII owner. Photo © 2000 Detroit Institute of Arts. Bequest of Robert H. Tannahill (70.158).**

lost as a result of Nazi persecution. The Nathan heirs, the court held, were "imputed with knowledge of [Nathan's] interest." Even if that were not the case, the court found that the heirs "should have made inquiry into the Painting's provenance well before 2002." The court noted that following an accounting of Nathan's estate in 1958, her Executor made additional Holocaust-related claims, and the heirs themselves cited the numerous congressional hearings on the issue of Nazi-era artwork beginning in 1998. The court held that the heirs' knowledge that Nathan was persecuted by the Nazis and sustained losses during the war "would have led a reasonable person to make further inquiries," which "would have revealed the sale of the Painting in 1938."[30]

"The second [museum] case involved another 1889 van Gogh painting, *Les Becheurs (The Diggers)*, which has been owned by the Detroit Institute of Arts since 1969. . . ."

Given its finding that the Nathan heirs knew or should have known that Nathan had once owned the painting and that the museum's ownership was "public knowledge and easily discoverable," the court concluded that ordinary diligence would have revealed a claim

[26] *Id.* at 805. The court noted that the heirs disputed whether a legitimate sale had occurred, citing a lack of documentation. Id. at 804 n.1.

[27] *Id.* at 804.

[28] *Id.* at 808.

[29] *Id.* at 807.

[30] *Id.*

shortly after the sale to the museum in 1939. Even if the cause of action did not accrue until 1958, when Nathan's estate was opened or, at the very latest, until 1998, when Congress held hearings held on the issue of Nazi-era artworks, the court held, the claims still were time-barred.[31]

The second case involved another 1889 van Gogh painting, *Les Becheurs (The Diggers)* **(FIG. 3),** which has been owned by the Detroit Institute of Arts since 1969, when it was given as a bequest from Robert H. Tannahill. Tannahill had purchased the painting for $9,360 from the same dealers who purchased the Toledo Gauguin from Martha Nathan in 1938. As with the Gauguin, neither Nathan nor her estate ever pursued restitution for the van Gogh, despite having sought restitution for other wartime losses, and it was not until 2004 that the heirs asserted a claim after having seen the painting on the Institute's Web site.[32]

"The Taylor, Toledo, and Detroit cases demonstrate that, under certain circumstances, courts have been willing to dismiss clearly untimely Holocaust art claims. . . ."

In August 2006, the Institute commenced a declaratory judgment action in the Eastern District of Michigan. The heirs counterclaimed for declaratory judgment, restitution, and conversion. As in the Toledo case, the Institute moved to dismiss the counterclaim based on the statute of limitations and laches. Under Michigan law, a replevin claim accrues on the date of the alleged wrong.[33] The court found that the heirs' claim accrued in 1938, when Nathan sold the painting. The court further held that even if a discovery rule were applied, the claim would have accrued by 1973, when the estate made additional restitution claims for Nathan's wartime losses.[34]

In May 2007, the Nathan heirs withdrew their appeals of both rulings, although they challenged the museums to arbitrate the claims.[35]

CONCLUSION

The Taylor, Toledo, and Detroit cases demonstrate that, under certain circumstances, courts have been willing to dismiss clearly untimely Holocaust art claims, and that, from the current owner's point of view, commencing a declaratory judgment action in response to a restitution demand can be an effective way to hasten that result.

In deciding whether to assert a statute of limitations claim or defense, the "atmospherics" of doing so must, of course, be taken into account. Ethical and moral considerations, in addition to legal ones, should, of course, enter into these decisions. But when evaluation of the evidence presented, as well as of additional evidence that diligent investigation might uncover, indicates that the works were sold voluntarily for what, at the time, was a fair market price or even, as in the Taylor case, were sold before the Nazis came to power, resolution of a Holocaust art dispute based on expiration of the statute of limitations hardly seems unjust. This is especially so when, as in the Taylor, Toledo, and Detroit cases, the heirs of the Holocaust victims decide, decades after the current owner innocently acquired the disputed work, to pursue claims based on information long in the public domain—claims, moreover, that the original owners themselves did not pursue.

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31 *Id.* at 808. The court also rejected the heirs' argument that the museum waived its statute of limitations and laches defenses by adopting the American Association of Museum Guidelines, pursuant to which the museum had posted the painting on its Web site, which led the heirs to contact the museum about it. The heirs argued that posting the painting on the Web site constituted "a general invitation to the public to come forward, make a claim, and collect damages." *Id.* The court held that the Guidelines were not intended to create legal obligations or mandatory rules and that the posting of the painting did not constitute a "voluntary and intentional relinquishment" of any legal defenses. *Id.* at 809.

32 *Detroit Institute,* 2007 WL 1016996, at *1-*2.

33 *Id.* at *3.

34 *Id.* As in the Toledo case, the court rejected the heirs' contention that posting the painting on the museum's Web site in accordance with the American Association of Museum Guidelines constituted an "intentional abandonment of a known right." *Id.* at *4.

35 *See* "Appeals Withdrawn, Nathan Heir Press Claim," *ARTnews* (Summer 2007), p. 58.

NAZI-ERA RESTITUTION LAWSUITS—

New Developments in the California Courts

CARLA SHAPREAU*

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INTRODUCTION

The last year has seen three significant art law cases in California involving Nazi-era claims for restitution. These cases, all venued in Los Angeles federal court, include *Marei von Saher v. Norton Simon Museum of Art at Pasadena et al*,[1] *Andrew Orkin et al. v. Elizabeth Taylor*,[2] and *Claude Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation*.[3]

Although many issues were raised by the parties, key to the courts' decisions included the interpretation and application of California's unique statutes of limitations, so often critical to victory or defeat in WWII-era lawsuits, and the bounds of the "expropriation exception" to the Foreign Sovereign Immunities Act after *Republic of Austria et al. v. Altmann*.[4]

CALIFORNIA'S STATUTES OF LIMITATIONS —A TANGLED THICKET

While most states have one, California has three statutes of limitations that may come into play in a battle for title to artwork. The *Von Saher v. Norton Simon Museum* and *Orkin v. Taylor cases* involve two of these three statutes, and the recent rulings in these cases have injected uncertainty into this area. In an effort to untangle the statutory landscape, the three statutes are briefly described below, before a discussion of recent cases.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 338(3)

For claims to recover artwork stolen or converted *before 1983*, California Code of Civil Procedure ("CCP") § 338(3) is the applicable statute of limitations. Section 338(3) provides for a three-year statute of limitations for "actions for the specific recovery of personal property," and applies equally to claims for the recovery of art and steam shovels. Unfortunately, section 338(3), by its vague terms, did not specify *when* such a claim arose, leaving courts with the task of determining when the three year clock starts to run.

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1 2007 WL 4302726 (C.D. Cal. 2007) (unpublished).

2 2005 U.S. Dist. LEXIS 43321 (C.D. Cal. 2005), *affirmed*, 487 F.3d 734 (9th Cir. Cal. 2007), *cert. denied*, 128 S. Ct. 491 (2007).

3 461 F. Supp. 2d 1157 (C.D. Cal. 2006)(argued and submitted in the U.S. Court of Appeal for the Ninth Circuit on September 24, 2007, and withdrawn on October 5, 2007 pending en banc review of *Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007)). The central question in *Sarei v. Rio Tinto* is whether United States courts are the appropriate forum for resolving claims by foreign nationals for violations of international law under the Alien Tort Statute for acts that took place in a foreign country (Papua New Guinea) by the defendant mining companies. The claims in *Rio Tinto* involved, among other things, alleged war crimes, crimes against humanity, and racial discrimination.

4 541 U.S. 677 (2004). Although this highly publicized ownership dispute over five Gustav Klimt paintings eventually resulted in the restitution of the paintings to a California resident, Maria Altmann, Altmann's right to sue the Republic of Austria in the U.S. under the "expropriation exception" to the Foreign Sovereign Immunities Act was challenged by Austria but upheld by the U.S. Supreme Court.

The result has been that state and federal trial and appellate courts that have applied this statute, have adopted varying standards, including:

(1) the date of an alleged theft or subsequent conversion, in some cases by an innocent purchaser, [5] (even though the theft victim did not know the whereabouts of the missing object or whom to sue);
(2) the date the claimant "actually" discovered the whereabouts of the property; and
(3) the date a claimant discovered, or reasonably could have discovered, the whereabouts of the missing property ("constructive discovery").

Application of these various standards has resulted in disparate results, the most recent of which have occurred in *Orkin v. Taylor* and *Marei von Saher v. Norton Simon Museum,* discussed below.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 338(C)

For claims to recover artwork stolen or converted from 1983 *to the present,* CCP § 338(c) is the applicable statute of limitations. Effective in 1983, the California Legislature amended section 338(3) to expressly add a "discovery" accrual rule for actions involving the theft of "any art or artifact" wherein the clock doesn't begin to run "until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft." [6] This statute was later amended twice, once in 1988, when section 338(3) was redesignated as 338(c), and again in 1989, when the Legislature substituted the phrase "article of historical, interpretive, scientific, or artistic significance," for the phrase "art or artifact." [7]

This unusual legislative setting suggests, as recognized by the court in *Naftzger v. The American Numismatic Society,* [8] that the pre-1983 statute "applies a discovery rule of accrual to *any* article stolen prior to the effective date of the 1983 amendment to section 338, subdivision (c), [and] is broader in scope than the amendment's discovery rule, which applies *only* to articles of historical, interpretive, scientific, or artistic significance." [9]

HOLOCAUST-ERA ARTWORK: CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 354.3

In 2002, the California Legislature enacted CCP § 354.3, which extends an already expired statute of limitations until December 31, 2010 for lawsuits against *any museum or gallery* regarding artwork taken as a result of Nazi persecution from 1929 to 1945. Section 354.3 provides in relevant part:

(a) The following definitions govern the construction of this section:
  (1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.
  (2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.
(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork . . . in a superior court of this state . . . .
(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

As discussed further below, the trial court in *von Saher v. Norton Simon Museum,* in an unpublished decision, struck down section 354.3 as unconstitutional.

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5 Questions of an innocent purchaser's good faith, lack of knowledge, and motive are ordinarily immaterial in a claim for conversion (the wrongful use or possession of someone else's property); it is enough that such a purchaser has dispossessed the rightful owner of his property rights. *Mendoza v. Rast Produce Co., Inc.,* 140 Cal.App. 4th 1395 (2006).

6 Stats. 1982, ch. 340, § 1.

7 Stats. 1988, ch. 1186, §1; Stats. 1989, ch. 467, §1.

8 42 Cal.App. 4th 421, (1996), *mod.,* 42 Cal.App. 4th 1806B (1996).

9 *Id.,* at 425 (emphasis added). The court in *Naftzger* applied an "actual" discovery standard, under which the theft victim's claim did not arise until she "actually" discovered the whereabouts of the stolen property, in contrast to a "constructive" discovery standard.

FIGURES 1 AND 2. LUCAS CRANACH THE ELDER, *Adam* and *Eve*, c.1530. Both oil on panel, 75 x 27½ inches. Currently in the collection of the Norton Simon Art Foundation in California and claimed by the heir of Jacques Goudstikker.

FIGURE 3. The Norton Simon Museum, exterior view.

"Marei von Saher . . . has lost the first round in a legal battle for title to . . . [Cranach's] *Adam* and *Eve*, currently in the collection of the Norton Simon Museum."

Whether, or not, the U.S. Court of Appeal for the Ninth Circuit will affirm this ruling will probably be decided within a year.

MAREI VON SAHER V. NORTON SIMON MUSEUM OF ART[10]

This dispute involves not one but two alleged misappropriations—the first by the Bolsheviks from the Stroganoff family, and the second by the Nazis from Jacques Goudstikker. Marei von Saher, the heir of famed art collector and dealer Jacques Goudstikker, has lost the first round in a legal battle for title to two large 16th century paintings by Lucas Cranach the Elder known as *Adam* and *Eve*, currently in the collection of the Norton Simon Museum in Pasadena **(FIGS. 1–3)**. They are valued at approximately $45 million.

PRE-WWII PROVENANCE OF THE CRANACHS

The parties agree that the Cranachs were located for some time at the Church of Holy Trinity in Kiev, Ukraine. By the early 1920s, the paintings were sent to a state-owned museum at Kievo Pecherskaia Lawra Monastery and then were transferred to the Museum of the Ukrainian Academy of Science, also in Kiev, in approximately 1927. When, in the late 1920s and 30s, the Soviets, in need of cash, began arranging for the sale of state-owned artworks abroad, the Cranachs were among those works auctioned off. The catalogue for the sale held in May, 1931 by Rudolph Lepke's Kunst-Auctions-Haus in Berlin, Germany was entitled, *Sammlung Stroganoff Leningrad* (Stroganoff Collection, Leningrad). Jacques Goudstikker was the successful bidder for *Adam* and *Eve*.

Von Saher asserts that, despite the title of the auction sale, the Cranachs were never "part of the Stroganoff

10 The Norton Simon Museum of Art at Pasadena, the Norton Simon Art Foundation, and the Norton Simon Foundation were collectively named as defendants in Marei von Saher's complaint, and are referred to as the "Museum"; the Norton Simon Foundation has been dismissed without prejudice. The Norton Simon Art Foundation has filed a complaint for declaratory and injunctive relief against Marei von Saher. Von Saher's lawsuit and the Norton Simon's are separate, with different action numbers. They were never consolidated into one action. (Von Saher's is CV07-02866 and the Norton Simon's is CV07-02850.)

family art collection."[11] In contrast, the Museum claims that the Cranachs were stolen from the Stroganoff family long before the Nazis came to power. Having acquired substantial wealth, including an extensive art collection housed at their palace in St. Petersburg, the Stroganoffs fled Russia for their safety when the Bolshevik Party seized power in 1917–1918, leaving their artworks behind. Under a formal decree nationalizing the personal property of citizens who had fled the Soviet Union, the Bolsheviks allegedly seized *Adam* and *Eve*. The issue of whether the Stroganoff family was the rightful owner of the paintings in the early 20th century is significant because, as discussed below, the Museum's alleged title to the paintings flows from George Stroganoff-Scherbatoff, who sold the Museum the Cranachs.

"This dispute involves not one but two alleged misappropriations—the first by the Bolsheviks from the Stroganoff family, and the second by the Nazis from Jacques Goudstikker."

The Museum has also alleged that, lacking the resources in 1931 to post bond for a lawsuit against the auction house, the Stroganoff family sought to stop the sale of the Cranachs at auction, and Princess Olga Stroganoff-Scherbatoff wrote a letter of protest to the auction house, claiming the collection was her property. The letter was published in newspapers in the U.S. and Europe and was also allegedly read at the beginning of the auction, putting bidders on notice of the Stroganoff's claims. The Museum has further asserted that, with full knowledge of the Stroganoff claim to the Cranachs, Goudstikker purchased these paintings at a depressed price, in light of the public controversy over title.

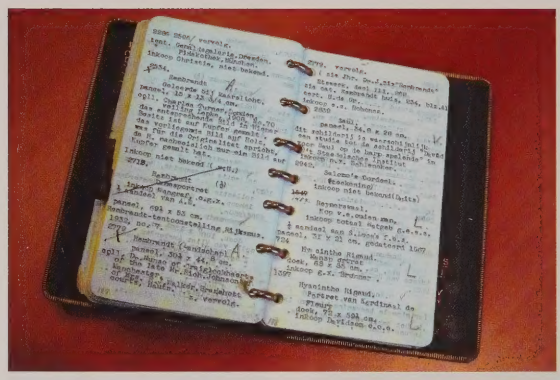

FIGURE 4. Jacques Goudstikker's notebook containing a detailed inventory of his collection. Photo: Courtesy of Marei von Saher.

EXODUS FROM THE NETHERLANDS

Just ahead of the Nazi invasion of the Netherlands on May 10, 1940, Jacques Goudstikker, his wife, Désirée, and his one-year-old son, Eduard, fled the country, leaving behind an enormous collection of art, as well as significant real estate holdings and other personal property. The two life-sized oil paintings on wood by Cranach were among the approximately 1,200 works of art Goudstikker left behind. While traveling on a ship bound for South America via England, on May 16, 1940, Goudstikker died in a shipboard accident. In his pocket, his wife found a notebook containing a detailed inventory of his art collection, which has been used by his family in its search for the lost art **(FIG. 4)**. Among the listings in the notebook are *Adam* and *Eve*.[12]

WARTIME FATE OF THE COLLECTION

Although the Goudstikkers had fled the Netherlands, two of Jacques' employees initially took over management of the Goudstikker Gallery, but Alois Miedl, a German banker and businessman living in the Netherlands, who also worked as a scout for Hermann Göring, quickly assumed the reins. In July 1949, Miedl purchased Goudstikker's real estate, the gallery's trade name, and other property for 550,000 guilders, and Göring acquired the rights to all of Goudstikker's

11 Von Saher's *Brief of Appellant*, U.S. Court of Appeals for the Ninth Circuit, Docket # 07-56691, at p. 7, citing the Complaint, at ¶ 11.

12 For a more detailed account of the Goudstikker's escape from The Netherlands and Jacques' shipboard accident, see, Peter Sutton, *Reclaimed: Paintings from the Collection of Jacques Goudstikker* (New Haven: Yale University Press, 2008).

artwork still in the Netherlands on June 26, 1940 for 2,000,000 guilders. This included the two Cranachs, *Adam* and *Eve*. For their part in arranging the sale, the gallery's personnel received 400,000 guilders from Miedl.[13] The purchase price was allegedly "far below their actual value" and also included "a promise of protection from threatened deportation for Jacques's mother."[14] Goudstikker's widow refused to grant permission for these transactions, as requested of her by one of Jacques' former employees. Nevertheless, they occurred. Göring sent the Cranachs to Carinhall, his country estate, where they remained throughout WWII.

At war's end, some of Goudstikker's artworks, including *Adam* and *Eve*, were recovered by the Allies, sent to the Munich Collecting Point, and restituted to the Netherlands, which held them in trust for the rightful owner. Of the purchase price of 2,550,000 guilders involved in the sale to Miedl and Göring, 1,363,752.33 guilders were allegedly left for Goudstikker after the war.[15]

GOUDSTIKKER'S CLAIM AGAINST THE NETHERLANDS

Goudstikker's widow, Désirée, provided the Dutch authorities with a copy of her husband's notebook in an effort to recover the family's artworks. In 1952, a settlement was reached between the Dutch government and Désirée, under which she recovered real estate and other property in exchange for monetary payment,[16] but the artworks obtained by Göring, including the Cranachs, were not included in this settlement. The time to file a claim under Dutch law during this era, expired in July, 1951.[17] In the late 1990s, von Saher filed a new claim for restitution in the Netherlands for the artworks acquired by Göring, but this claim was rejected as time-barred.

After a 2001 Dutch policy change regarding restitution of Nazi-era looted art, the government reconsidered von Saher's claim for the artworks that Göring had acquired from Goudstikker. In 2005, the Dutch Restitutions Committee concluded that with regard to the Göring transaction, "Goudstikker suffered involuntary loss of possession," and 200 of those artworks were returned to von Saher in 2006.[18] The two Cranachs that are the subject of the California litigation, however, were not among the restituted works because they had been the subject of an earlier claim to the Dutch government by George Stroganoff-Scherbatoff, of which von Saher was allegedly unaware.

GEORGE STROGANOFF-SCHERBATOFF'S CLAIM TO THE CRANACHS

George Stroganoff-Scherbatoff, heir to the Stroganoff dynasty, learned in 1961 that *Adam* and *Eve* had been repatriated to the Netherlands after WWII. He petitioned the Dutch government for return of the Cranachs, as well as paintings by Rembrandt and Petrus Christus, all sold in the 1931 auction. After five years of negotiations, Stroganoff-Scherbatoff received the Cranachs and the Christus in exchange for a waiver of his claim to the Rembrandt, plus payment to the Dutch government of 60,000 guilders.[19] The Norton Simon has alleged that this 1966 restitution was an official act of state of the Dutch government, which

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13 Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (Case number RC 1.15) 2005, ("Restitutions Committee Recommendation"), p. 5.

14 Von Saher's *Brief of Appellant*, United States Court of Appeals, Ninth Circuit, No. 07-56691 (2008), p. 6, citing the Restitutions Committee Recommendation, p. 5.

15 Restitutions Committee Recommendation, RC 1.15, pp. 5-6.

16 Under this settlement, Goudstikker's widow paid 483,389.47 guilders to recover a portion of the family's lost property, which arguably left her with 880,362.86 guilders. The family allegedly had sizable losses, including, but not limited to, non-inventoried works of art and other goods that von Saher has estimated were valued between 610,000-810,000 guilders.

17 *Answering Brief of Defendants-Appellees Norton Simon Museum of Art at Pasadena*, U.S. Court of Appeals for the Ninth Circuit, Docket # 07-56691, p.15.

18 Restitutions Committee Recommendation, RC 1.15, pp. 5-6. On February 6, 2006, the Dutch State Secretary for Culture, Education and Science adopted the Restitutions Committee's findings. See "Letter re application for restitution of Goustikker Collection" sent by the Dutch Minister for Education, Culture, and Science to Mr. Van Holthe tot Echten, (English translation, 4 pages), Von Saher's *Excerpts of Record*, Volume II of II, pp. 20-24. The Restitutions Committee pointed out that a number of Goudstikker's paintings were missing and that others from his trading stock had been auctioned off by the Netherlands in the 1950s. The Restitutions Committee recognized that the Netherlands had exercised the right to use the Goudstikker paintings for almost 6 decades for no consideration. Restitutions Committee Recommendation, pp. 12-13.

19 Museum's Complaint for Declaratory and Injunctive Relief, at ¶ 81.

vested full title to *Adam* and *Eve* in George Stroganoff-Scherbatoff. In 1970 and 1971, Stroganoff sold *Adam* and *Eve* to the Museum for $800,000, where they still remain.

MAREI VON SAHER'S PURSUIT OF *ADAM* AND *EVE*

Von Saher asserts that she had no reason to suspect that the Cranachs were not in the possession of the Dutch government along with the other Goudstikker artworks, but were instead in the possession of a California museum. She alleges that it was not until November 2000 that she discovered that *Adam* and *Eve* were at the Norton Simon Museum, whereupon she made repeated demands for their return, which were rejected. During these discussions, she and the Museum entered into an agreement, suspending the statute of limitations as of September 26, 2003. The Museum has indicated that it voluntarily submitted to two mediations in 2005 and 2007. But on May 1, 2007, both parties filed suit over the Cranachs in Los Angeles.

THE CALIFORNIA LITIGATION

The federal trial court, sitting in Los Angeles, granted the Museum's motion to dismiss von Saher's claims on October 18, 2007, being the first court to hold that California's Holocaust-era statute of limitations for the recovery of art (CCP § 354.3) is unconstitutional. It also held that von Saher's claim was time-barred under California's statute of limitations for the recovery of personal property (CCP § 338). The trial court found it unnecessary to rule on the other legal theories advanced by the parties, basing its decision exclusively on the two statutes of limitations.

THE TRIAL COURT RULED VON SAHER'S CLAIMS TIME-BARRED

Interpreting California's statute of limitations pertaining to art stolen before 1983, the court noted, "Under the version of California Code of Civil Procedure § 338 in effect at the time Defendants [The Museum] acquired the Cranachs, Plaintiff's predecessor-in-interest had three years to bring "[a]n action . . ., including actions for the specific recovery of personal property. . . . Plaintiff did not inherit her alleged claim to the Cranachs until July 21, 1996—long after the applicable statute of limitations on that claim would have expired."[20] The court elaborated, saying that von Saher's "alleged 'discovery' of the whereabouts of the Cranachs would not revive the statute of limitations governing her claims which had expired many years prior."[21]

The trial court appears to have started California's statutory three-year window to file suit from the date the Museum acquired the paintings, in 1970 and 1971. By excluding any reference to a discovery accrual rule, this interpretation of CCP § 338 (3) ignores prior California court precedent.[22]

The Museum, relying on the recent Ninth Circuit decision in *Orkin v. Taylor* (discussed below), argued that a "constructive discovery" accrual rule should apply to von Saher's claims, under CCP § 338. Under this analysis, the Museum contended that more than three years had elapsed since von Saher or her predecessors could, with the exercise of reasonable diligence, have discovered the whereabouts of the Cranachs.

The Museum maintained that its ownership of the Cranachs, acquired in 1970 and 1971, has been a matter of widespread public knowledge, and that, moreover, the paintings have been on continuous display since 1979, have been written about in many publications, and have been loaned for exhibition to the National Gallery of Art and the Princeton University Art Museum. Furthermore, the Museum is often contacted regarding permission to reproduce and borrow the paintings, which, it asserts, demonstrates that the whereabouts of *Adam* and *Eve* could have been timely discovered by von Saher.[23]

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20 *Von Saher*, 2007 WL 4302726, at *3.

21 *Id.*, at fn. 1.

22 *See Naftzger*, at 425 and *Orkin*, at 741. Although *The Society of California Pioneers v. Baker*, 43 Cal.App.4th 774 (1996) (sitting in the First District, California Court of Appeal), disagreed with the standard adopted by the court in *Naftzger*, (sitting in the Second District, California Court of Appeal), the *Baker* court's disagreement is merely *dicta* since its ruling was *not* under the pre-1983 version of the statute, but under the 1983 amendment to the statute of limitations, which expressly includes a discovery accrual standard.

23 Norton Simon Art Foundation's Complaint, at ¶¶107-115.

But von Saher, at this stage of the litigation, has relied on California's Holocaust-era statute of limitations, which extends the statute of limitations for suits brought to recover Holocaust-era artwork until 2010. Should the Ninth Circuit affirm the trial court's holding, striking down California's Holocaust-era statute, von Saher has indicated that she will seek leave to amend her complaint to include the necessary allegations to defeat the Museum's statute of limitations defense under CCP § 338.

Whether von Saher will be compelled to proffer evidence to overcome the more general statute of limitations, under CCP § 338, is yet to be determined. If the Cranachs had been in the custody of the Dutch Government in 2006, along with the other Goudstikker artworks, von Saher claims that the paintings would have been returned to her. Was it reasonable for von Saher to presume that the Cranachs were still in the Netherlands, along with the other Goudstikker artworks? Should the Goudstikker family have ascertained that the Dutch government had sold them in 1966? If so, when and how? Would it have been reasonable for von Saher to have obtained an inventory from the Dutch government of all the artworks Göring had acquired from Goudstikker that remained in the Netherlands over the last 60 years?

"[The court held] that California's Holocaust-era statute of limitations for the recovery of art is unconstitutional."

When would it have been reasonable for von Saher to discover that the Cranachs were in California? It is interesting to note that "[b]etween 1510 and 1540, Cranach painted the subject of *Adam* and *Eve* over thirty times."[24] Some say he painted this subject more than fifty times.[25] Does this number factor into when it would have been reasonable for von Saher to have discovered the whereabouts of Goudstikker's Cranachs? If the Ninth Circuit does not permit von Saher to pursue her claims under the protection of California's unique Holocaust-era statute of limitations, the facts relating to whether or not she timely filed her claims against the Museum under CCP § 338, will likely be the subject of further litigation.

CALIFORNIA'S HOLOCAUST-ERA STATUTE OF LIMITATIONS HELD UNCONSTITUTIONAL

The trial court held that California's Holocaust-era statute of limitations (CCP § 354.3) impermissibly intrudes upon the "foreign affairs power" of the United States. It found the statute unconstitutional on its face. The court, relying on *Deutsch v. Turner Corp.*,[26] a prior Ninth Circuit decision involving another statute, stated that section 354.3 "seeks to redress wrongs committed in the course of the Second World War" and "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims."[27]

The Ninth Circuit in *Deutsch,* invalidated CCP § 354.6, a statute that provided a cause of action for injuries sustained by slave labor victims during WWII. In that case, the Ninth Circuit stated that, "Because California lacks the power to create a right of action—or, alternatively, to resurrect time-barred claims—in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional."[28] The Ninth Circuit reasoned, "California has sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved."[29]

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24 See Norton Simon Museum's website, at: *http://www.nortonsimon.org/guide_item.aspx?id=348&item=cranach*

25 *See Temptation in Eden: Lucas Cranach's Adam and Eve, Courtauld Institute of Art Gallery,* ed. Caroline Campbell (2007). (The book's online description at amazon.com provides, in part: "The Courtauld's Adam and Eve is arguably the most beautiful of Cranach's fifty or more depictions of this subject…").

26 324 F.3d 692 (9th Cir. 2003).

27 *Von Saher v. Norton Simon Museum,* at *3, *quoting Deutsch,* at 712.

28 *Deutsch,* at 716.

29 *Id.*, at 712. *Compare American Insurance Ass'n v. Garamendi,* 539 U.S. 396 (2003); *Alperin v. Vatican Bank,* 410 F.3d 532 (9th Cir. 2005).

Von Saher urged that because the dispute is between a U.S. citizen and a California museum, the statute does not implicate the foreign affairs powers of the federal government. It does not, for example, subject a wartime enemy to suit or punish defendants for war crimes because, by its terms, the statute may address conduct committed after WWII, including the Museum's alleged conversion of the Cranachs in 1971. The trial court rejected these assertions.

Von Saher has appealed the trial court's unpublished order, which granted the Museum's motion to dismiss. This dispute is now pending before the U.S. Court of Appeal for the Ninth Circuit. Two friends of the court briefs have been filed in the Ninth Circuit, which echo, in part, the arguments raised by von Saher. The first was submitted by several Jewish organizations,[30] who have asserted that the foreign affairs powers were not implicated by section 354.3, arguing that the Executive Branch has "encouraged museums, galleries and others to return stolen and confiscated Holocaust-era artwork to their rightful owners...acknowledg[ing] that the federal government has no specific role in the art restitution process..."[31]

These *amici* also state that "it would be extremely ironic if a claimant could sue the Austrian government for the recovery of her artwork in a Los Angeles court, (*Republic of Austria v. Altmann*, 541 U.S. 677 (2004)), but could not sue an American art gallery or museum for such recovery."[32]

The second *amicus* brief was filed by the State of California, also on behalf of von Saher, in which the California Attorney General similarly argues that section 354.3 is constitutional and distinguishable from the law struck down in *Deutsch*, because unlike the statute at issue in *Deutsch*, section 354.3 "does not address claims that have already been resolved through federal treaty or agreement or for which a federal policy establishes a resolution process,"[33] noting that section 354.3 addresses "garden-variety" property claims against museums and galleries in possession of Nazi-era looted art.

As this article went to press, the hearing for argument before the Ninth Circuit is scheduled for December 8, 2008.

ORKIN ET AL. V. TAYLOR
CALIFORNIA'S STATUTE OF LIMITATIONS AND THE HOLOCAUST VICTIM'S REDRESS ACT[34]

The actress Elizabeth Taylor received a letter in 2003 from the heirs of Margarete Mauthner ("Orkin") demanding that she return the painting *Vue de l'Asile et de la Chapelle de Saint-Rémy* by Van Gogh (see illustration on p. 14 of this issue), which she had purchased at a Sotheby's London auction in 1963 for £92,000. Orkin alleged that the painting had been misappropriated from Mauthner during the Nazi-era. Taylor rejected Orkin's demand and filed suit in Los Angeles federal trial court for declaratory relief to establish her title. Orkin responded and filed a complaint against Taylor, seeking recovery of the painting, or its monetary value.

Mauthner had purchased the Van Gogh from the Berlin art dealer Paul Cassirer, in or about 1906, and her heirs claimed that when Mauthner fled Germany to South Africa in 1939, to avoid persecution by the Nazis, the painting was sold "under duress."[35] Taylor argued that no Nazi coercion had taken place and that her acquisition and ownership of the Van Gogh were well publicized and reasonably discoverable over the many decades she has possessed it. In

30 *Amici* include, Bet Tzedek Legal Services, The Jewish Federation Council of Greater Los Angeles, the American Jewish Congress, the American Jewish Committee, the Simon Wiesenthal Center, and the Commission for Art Recovery.

31 Brief of Amici Curiae Bet Tzedek Legal Services [et al] in Support of Plaintiff-Appellant Seeking Reversal of Order Dismissing Complaint, at pp. 19-20, *citing* Remarks by J. Christian Kennedy, Special Envoy for Holocaust Issues, Potsdam, Germany, April 23, 2007, E.R. at 12-15.

32 *Id.*, at p. 13.

33 *Brief of Amicus Curiae State of California in Support of Appellant Marei von Saher*, at p. 10.

34 *Orkin v. Taylor* is the subject of an in depth article in this issue of *IFAR Journal* by Jonathan Bloom and Steven Reiss, who litigated on behalf of Ms. Taylor.

35 Orkin cited "laws promulgated by the Allied Forces after WWII, which established a presumption that any transfer or relinquishment of property by a persecuted person within the period January 30, 1933 to May 8, 1945 was an act of confiscation, Military Government Law No. 59 § 375(b)." *Orkin*, 487 F.3d at 737.

Orkin v. Elizabeth Taylor,[36] both the federal trial court and the United States Court of Appeal for the Ninth Circuit ruled in Taylor's favor, holding that Orkin's claims were time barred by California's 3-year statute of limitations. They also rejected Orkin's claim under the federal Holocaust Victim's Redress Act.[37]

The Ninth Circuit adopted a "constructive discovery" rule, under which "a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property."[38] In doing so, the court crafted a new standard in California, in an effort to "predict how the state's highest court would decide the question,"[39] of what rule governs accrual of pre-1983 causes of action for theft and conversion. The rule announced by the Ninth Circuit did not follow prior state law precedent set forth in California's intermediate state appellate court, in *Naftzger v. the American Numismatic Society* (discussed above), which applied an "actual discovery" accrual rule for pre-1983 causes of action, not a "constructive discovery rule."

To date, California's highest court—the California Supreme Court, has not ruled on what standard governs accrual of a claim to recover artwork stolen or converted before 1983, under CCP § 338(3). The ultimate interpretation of section 338(3) is a matter for the California Supreme Court to determine, when, and if, such a case comes before it. A federal court is generally required to follow the state's intermediate appellate court precedent, if available, unless the federal court finds convincing evidence that the state's highest court would not follow it.[40] The Ninth Circuit concluded that should the California Supreme Court interpret CCP § 338(3) it would employ a constructive discovery accrual rule.[41] In affirming the trial court's dismissal of Orkin's claims under the Holocaust Victim's Redress Act, the Ninth Circuit held that this federal legislation did not create a private right of action against private art owners, pointing out that its focus is on "governments" rather than individuals, and that the statute "does not 'explicitly confer [] a benefit on' Holocaust victims; it merely expresses Congress's sense that Holocaust survivors and heirs should benefit fully from preexisting protections."[42]

The United States Supreme Court denied Orkin's petition for *writ of certiorari* on October 29, 2007, therefore, this dispute has come to its judicial end.

CASSIRER V. KINGDOM OF SPAIN, ET AL.[43] AND THE EXPROPRIATION EXCEPTION TO SOVEREIGN IMMUNITY

Cassirer v. The Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation ("Foundation") raises the provocative question: When can a foreign sovereign be sued in the United States where the foreign state has had no role in the allegedly illegal taking of the art in dispute, the art is not located in the U.S., and the foreign state's commercial activities in the U. S. have only occasionally related to the artwork?

The case involves a claim by Claude Cassirer, a California resident, to recover an 1897 painting by Camille Pissarro entitled *Rue Saint-Honoré, Après-midi, Effet de Pluie*, which is currently in the Thyssen-Bornemisza Museum in Madrid **(FIG. 5)**. Prior to World War II the painting was owned and prominently displayed by Claude's grandmother, Lilly Cassirer Neubauer, who inherited it from her first husband, who had, in turn, acquired it in 1924 from his father Julius Cassirer, a noted art dealer of Impressionist and Post-Impressionist paintings. Julius had purchased it in 1898 directly from Pissarro's dealer, Durand-Ruel.

As a Jew, Lilly Cassirer endured persecution after the Nazis came to power in 1933. Before fleeing Germany in 1939, the claim asserts, Lilly was forced to surrender

36 *Supra,* fn. 2.

37 Pub. l. No. 105–158, 113 Stat. 15 (1998).

38 *Supra,* fn. 2, at 741.

39 *Id.*

40 *Ryman v. Sears,* 505 F.3d 993 (9th Cir. 2007).

41 44 Cal.3d 1103 (1988). It reasoned that the California Supreme Court would follow its prior ruling in *Jolly v. Eli Lilly & Co.,* which involved a claim for personal injury allegedly caused by a defective drug.

42 *Orkin,* at 740. The Act provides, in part: "It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." *Holocaust Victims Redress Act,* §202, 112 Stat. at 17-18.

43 *Supra,* fn. 3.

the Pissarro to an alleged agent of the Nazi regime, Munich art dealer Jakob Scheidwimmer. Scheidwimmer paid Ms. Cassirer "a derisory ... 900 Reichsmarks, —about $360 at 1939 exchange rates,"[44] for the Pissarro, placing the funds into a blocked bank account that she could never access.

By 1952, the Pissarro made its way to the New York gallery, Knoedler & Co., and later in 1976 to New York art dealer, Stephen Hahn,[45] who sold it to Baron Hans-Heinrich Thyssen-Bornemisza. The Baron eventually sold the painting to the defendant Thyssen-Bornemisza Collection Foundation in 1993. Without ever discovering the Pissarro's whereabouts, despite alleged efforts to find it, Lilly died in the United States in 1962, leaving her grandson, Claude Cassirer, as her sole heir.

"The federal trial court, sitting in Los Angeles, has ruled that it has jurisdiction to hear Cassirer's claims against the Kingdom of Spain and the Foundation. . . . The decision has been appealed . . ."

The federal trial court, sitting in Los Angeles, has ruled that it has jurisdiction to hear Cassirer's claims against the Kingdom of Spain and the Foundation. The case is significant in its interpretation and application of the Foreign Sovereign Immunities Act ("FSIA").[46] The decision has been appealed to the Ninth Circuit by the Kingdom of Spain and the Foundation, who contend that the California trial court *does not* have personal or subject matter jurisdiction over the dispute, and that they are immune from suit under the Foreign Sovereign Immunities Act.

FIGURE 5. CAMILLE PISSARRO, *Rue Saint-Honoré, Après-midi, Effet de Pluie,* **1897. Oil on canvas, 81 x 65 cm. Now part of the Museo Thyssen-Bornemisza, Madrid, but claimed by a California resident, Claude Cassirer.**

THE ELEMENTS OF THE EXPROPRIATION EXCEPTION

Ordinarily sovereign states, such as Spain, are immune from suit in U.S. courts under the FSIA, unless an exception applies. The trial court noted that both subject matter and personal jurisdiction over a foreign state will arise under the FSIA if all "the following four conjunctive elements of the expropriation exception are present:

(1) that rights in property[] are at issue,
(2) that the property was 'taken,'
(3) that the taking was in violation of international law, and
(4)(a) 'that property ... is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is *engaged in a commercial activity in the United States.*'"[47]

Because the trial court's ruling related to whether or not it had jurisdiction to hear the dispute, the court only needed, at the preliminary stage, to determine whether the claims were substantial and non-frivolous

44 Cassirer Complaint, at ¶ 23.

45 In July, 2004, Cassirer filed a separate lawsuit in Santa Barbara Superior Court against art dealer Stephen Hahn. The trial court ruled that Cassirer could proceed against Hahn under a "constructive trust theory." Counsel for Cassirer, Stuart Dunwoody, has indicated that after this ruling the matter was "resolved by mutual agreement."

46 28 U.S.C. § 1602 *et seq.*

47 *Cassirer,* at 1169, *quoting Garb,* 440 F.3d at 588 (emphasis added).

and provided a sufficient basis for the exercise of jurisdiction. The court was not required to rule on whether the taking *actually* violated international law.

The parties did not dispute the first two elements of the exception. Guided, in part, by the Supreme Court's decision in *Republic of Austria v. Altmann,*[48] the trial court, ruling in Cassirer's favor on defendants' motion to dismiss the complaint, found grounds for jurisdiction to hear the dispute.

Key to the court's ruling was its holding that Spain need not have been involved in the "taking" of the Pissarro in 1939 for the expropriation exception to kick in. It was enough that an agent of the Nazi regime, Scheidwimmer, had allegedly taken the artwork from Cassirer without just compensation for the third element to be satisfied. The court pointed out that, "the language of the statute contains no such limitation, and the logic of the few decisions that have decided the question teaches that no such limitation should be implied." [49]

In this bout for title between two alleged innocents —the theft victim's heir and the downstream purchaser, the prevailing common-law rule in the U.S. is that a thief cannot pass good title even to a *bona fide* purchaser.[50] Cassirer has argued that this common-law rule is consistent with interpreting the expropriation exception to apply to foreign states in possession of property taken in violation of international law.[51] The Foundation considers this argument "*a non sequitur.* The question is whether Congress had this goal in mind when it drafted § 1605(a)(3). There is absolutely no reason to believe that it did." [52]

The federal trial court rejected Spain's contention that the Foundation is not an agency or instrumentality of the Spanish government, noting numerous instances of Spain's exercise of control over the Foundation regarding what it viewed as commercial acts, including, but not limited to, payment of $327 million to fund the purchase of the Baron's collection, and that two-thirds of the Foundation's directors "must" be representatives of Spain, appointed by the government and freely removable through royal decree. Spain also asserted that Cassirer was required to exhaust his judicial remedies in Germany or Spain before suing in the U.S. Again, the trial court did not agree, finding that the plain language of the statute contained no such requirement. The court also relied on the majority decision in *Altmann.*

"Spain also asserted that Cassirer was required to exhaust his judicial remedies in Germany or Spain before suing in the U.S. Again, the trial court did not agree . . ."

Stretching credulity, Spain contended that because Lilly Cassirer was a German national, the exception did not apply. They reasoned that in order "[t]o fall under this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law."[53] But Judge Allen found compelling evidence had been proffered by Cassirer that his grandmother was *not* a German citizen when Scheidwimmer took the Pissarro from her since, "according to the Nazis' citizenship laws at the time, a Jew could "not be a citizen of the Reich."[54]

THE COMMERCIAL ACTIVITY REQUIREMENT

The lower court concluded that defendants had engaged in the requisite commercial activity in the United States to trigger the expropriation exception.

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48 541 U.S. 677 (2004).

49 *Cassirer,* at 1163.

50 See *e.g., Naftzger, supra,* at 432.

51 *Appellee's Brief,* at 28-29.

52 *Foundation Reply Brief,* at 15.

53 *Id.* at 1165, *quoting Altmann,* 317 F.3d 954, 968 (9th Cir. 1998), *aff'd,* 541 U.S. 677.

54 Spain contended that Jakob Scheidwimmer was not an agent of the Nazi party, and that, therefore, a foreign sovereign had not been implicated in the "taking." The court responded that "either based on a review of the evidence or strictly viewing the unrebutted allegation in the Complaint, Scheidwimmer can be considered as an agent of the Nazi German regime and the Court concludes that the taking of Ms. Cassirer's Painting was indeed by a sovereign." *Cassirer,* at 1165.

Therefore, the lawsuit *could* proceed in Los Angeles. The FSIA defines commercial activity as follows:

> A 'commercial activity' means *either* a regular course of commercial conduct *or* a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by its purpose (emphasis added).[55]

In determining what conduct will be deemed "commercial," the court pointed out that if the conduct at issue is the type through which a private party engages in trade or commerce, the motive behind the activity will not be determinative. Relying again on *Altmann,* the court explained that, "the establishment of a tariff would be a sovereign act because private parties do not regulate foreign trade, but contracting to purchase boots for an army would be a 'commercial activity' because it is the type of conduct in which private parties engage."[56]

The court rejected defendants' claim that the FSIA exception required a nexus between the "commercial activity" and the lawsuit. "The statutory language imposes no requirement that the commercial activity relate in any way to the illegally expropriated property."[57] Although the Pissarro has not been in the U.S. since 1967, the court reasoned that there had been limited and occasional commercial activity in the U.S. pertaining to the painting, including the Foundation's confirmed sale of a poster and an allegation of sales of catalogues and publications containing copies of the painting.

Numerous other commercial activities by defendants in the U.S. were also alleged that did not relate to the painting, some of which included many purchases and sales in the U.S., including media licensing agreements with U.S. museums, the loan by individuals and institutions in the U.S. to the Foundation of artwork, and marketing and commercial promotion by the Foundation in the U.S. Relying again on *Altmann,* the court noted that authoring, promoting, publishing, distributing, and selling books and other publications in the U.S. exploiting the artwork at issue, was the type of activity that *would* be sufficient to meet the commercial activity factor, ruling that the requisite element of commercial activity was present.[58]

Because the court concluded that it has subject matter jurisdiction over defendants and that effective service of process has occurred, it explained that personal jurisdiction followed, as a matter of law, under the terms of the FSIA.[59] Responding to defendants' concern that permitting jurisdiction would result in increased litigation in American courts over Nazi-era looted art now possessed by foreign states, the trial court remarked that permitting jurisdiction "will [not] convert the federal district [trial] courts into international courts of claim for those seeking recovery of property looted by the Nazi regime,"[60] reasoning that the number of such cases is likely to be small. But even if it were not, the result "flows directly from the language of the statute, which reflects Congressional policy."

The Ninth Circuit's ruling in *Cassirer* is expected within the year. It will hopefully further define, after *Altmann,* under what circumstances a foreign state in possession of stolen art may be sued in United States courts, even though: 1) the art is not present in the U.S.; 2) the commercial activity in the U.S. by defendants relating to the stolen art may be "occasional"; and 3) the foreign state is an alleged innocent purchaser.

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55 28 U.S. C. § 1603(d).

56 *Cassirer,* at 1171.

57 *Id.*

58 *Id.,* at 1170-1177.

59 *Id.,* at 1166.

60 *Id.*

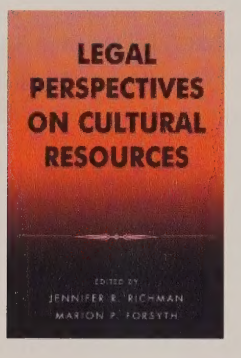
ANTIQUITIES AND THE LAW:

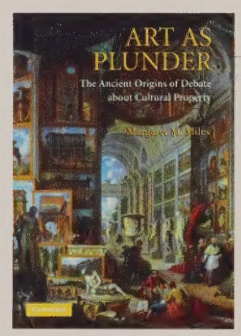
A SURVEY OF RECENT BOOKS

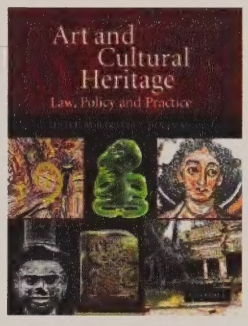
SUSAN B. BRUNING*

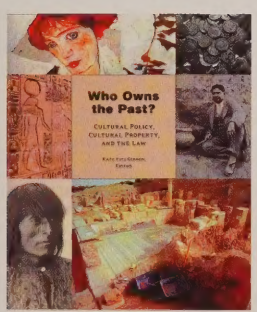
EDITOR'S NOTE:

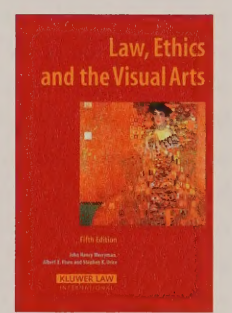
In 1998, IFAR invited attorney Susan Bruning to survey "Current Art Law Books" (IFAR Journal, Vol. 2, no. 1). In its continued interest in the subject, IFAR has asked Ms. Bruning to do a new survey focusing specifically on the mushrooming body of literature devoted to the collecting and owning of cultural property/ antiquities.

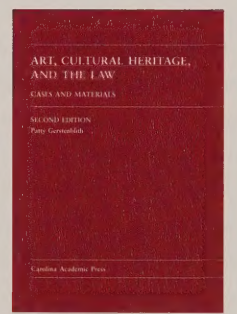


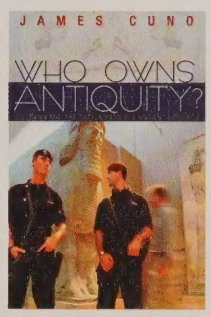


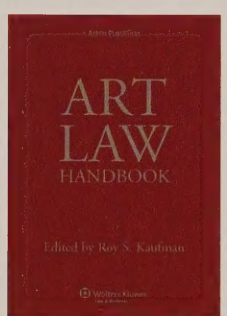


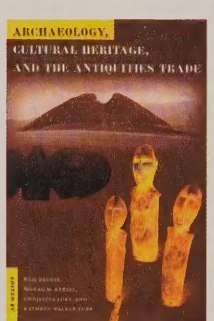


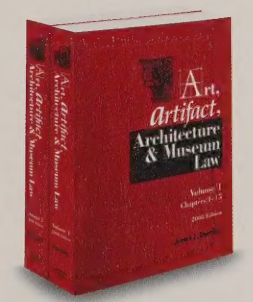












* Susan Bruning, Esq., is an attorney in Dallas, Texas, the founder of Bruning Law Firm PC, and an adjunct professor at Southern Methodist University and Texas Wesleyan University. In 2007, she co-organized the conference *The Future of the Past: Ethical Implications of Collecting Antiquities in the 21st Century* at SMU. She is also a doctoral candidate in anthropology at SMU.

INTRODUCTION

Laws governing the acquisition, ownership, and control of ancient objects were scarcely explored by scholars a few decades ago. How things have changed! As this survey of books suggests, the topic has exploded onto the international landscape and is shaping laws, ethics, politics, and policy. Ten years ago, I wrote an article for the *IFAR Journal* addressing the legal complexities of collecting Native American cultural property,[1] commenting that "[t]he struggle between public outcry to preserve and repatriate culturally important items and private demand to own such items creates a tense — and legally murky — environment within which the collector of antiquities must judge the validity of acquiring or selling [objects]." A decade later, tensions have increased and legal waters have grown murkier as global tugs-of-war over cultural objects intensify. The burgeoning debates over legalities and ethics of collecting cultural property make headlines, shape politics, and transform collections of many of the world's leading cultural institutions.

We lack a universally accepted term for objects often labeled as cultural property. In general, these include objects having historical, archaeological, or cultural importance in addition to, or in lieu of, aesthetic or economic value in the fine arts marketplace. Objects at stake vary mightily. They include pottery removed from ancient graves; coins pulled from deep-sea shipwrecks; even meteorites fallen from space.[2] Cultural property laws, policies, and ethics have been invoked in high profile disputes over items such as the Elgin Marbles, the Dead Sea Scrolls, and tattooed Maori skulls. Often labeled "antiquities" by the art market and museum world, "artifacts" by the archaeological community, "cultural patrimony" by nations governing the lands where they were found, and "cultural heritage" by indigenous groups whose ancestors created them, such objects attract the interest of scholars, collectors, and the larger public beyond the bounds of geographic location or ethnic affiliation. The term "cultural property" is often used in the legal realm, where debates over control of objects focus on property rights and laws relating to acquisition, movement, and control.

"Laws governing the acquisition, ownership, and control of ancient objects were scarcely explored by scholars a few decades ago. How things have changed!"

A complex international matrix of laws, regulations and policies has been developed and interpreted in an effort to address questions of ownership and control of cultural property. Times change, and perspectives change. Just as cultural objects reflect the perspectives of cultural groups at particular times and places, laws seek to reflect societal perspectives of right and wrong at particular times and places. Legal and ethical perspectives about the acquisition and trade in cultural objects have seen radical transformations over the last fifty years. As a result, the trade and collection of cultural objects have unfolded in ways once considered legal and ethical but increasingly subject to scrutiny. In response to growing debates over, and increased media attention given to, claims for the return of objects to war victims or looted nations, a plethora of books and articles relating to the legalities and ethics of collecting cultural property have been and continue to be published. The following discussion will survey ten recent books, compare and contrast key topics and perspectives addressed therein, and provide references to some of the many additional resources available for those wishing to delve further into this intriguing and complicated morass.[3] Although a few of the books discussed also explore general art law issues, this article focuses only on the sections specifically relating to the field of cultural property.

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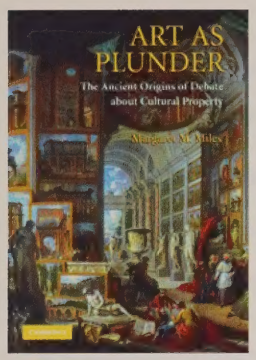
1 Susan Bruning, "Native American Art and Antiquities: A Legal Primer for Collectors." In *IFAR Journal*, Vol. 1, no. 2 (1998).

2 The 15-ton Willamette Meteorite landed in Oregon in 1902 and was acquired by the American Museum of Natural History in New York in 1906. The Clackamas tribe, a member of Oregon's Grand Ronde Tribal Council, claimed the meteorite — which it calls *Tomanowas* — as a sacred object subject to repatriation under the Native American Graves Protection and Repatriation Act. The parties settled a lawsuit over ownership; the object remains in the museum with the tribe having certain rights of access.

3 There are many publications beyond those included in this article that speak well to these issues and should be sought out by those with an interest. I extend my apologies at the outset to those authors whose works deserve acknowledgment and discussion but could not, due to limitations of space, be addressed here.



ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY

Margaret M. Miles

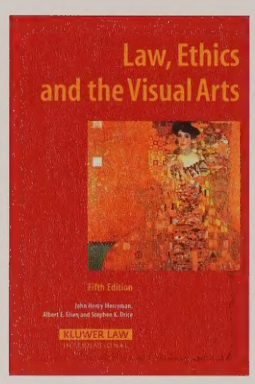
Cambridge University Press, New York, 2008
440 pp., hardcover, $90
ISBN 0521872804

We begin our survey in ancient Rome, a suitably intriguing origin. In her recent book, *Art as Plunder: The Ancient Origins of Debate about Cultural Property,* Margaret Miles, an archaeologist and professor at the University of California, Irvine, and at the American School of Classical Studies at Athens, elucidates the cultural property debates as longstanding and relentless ones. Through her exploration of Cicero's speeches delivered during the prosecution of Gaius Verrus for his use of the Roman army to plunder ancient Greece, Miles offers ancient foundations for the premise that cultural property has significance — legally, ethically, and scholarly — beyond ordinary property. Content and context have distinguished art and artifacts from other types of property for ages.

The notion of property rights in Cicero's time is described as one distinguishing between sacred, public, and private property. Taking of private property constituted theft, while taking of public property constituted embezzlement, and taking of sacred property constituted sacrilege. In looking at today's debates, these distinctions continue to resonate. Is the taking of an object in violation of a national patrimony law that vests ownership in the state (thus, public property) the same as theft of a privately owned object? Is the repatriation of a ceremonial object to a Native American tribe based on its sacredness to the tribe something that the law can or should mandate? These questions are engaged, in varying contexts and from varying perspectives, in Miles' book and the others surveyed below. Miles discusses the shift in legal perspective from art as legal spoils of war to art as protected cultural property. She also comments on the despoliation of monuments and structures, recognizing that destruction in times of military action and dismemberment in times of looting for the antiquities trade both result in irreparable loss. Miles discusses the origins of the term "vandalism," citing its earliest known use by the Abbé Henri Grégoire in the 1790s to refer to the damage to and destruction of French monuments, churches, and tombs after the French Revolution. In this context, she also explores the actions of Lord Elgin in removing stone sculptural fragments from the Parthenon, a topic debated in a number of the surveyed books. In her epilogue, "The Continuing Plunder of Art," Miles succinctly summarizes key issues at the heart of the current cultural property debates:

> The issue of repatriation of art or archaeological artifacts acquired by museums long ago and under very different circumstances, such as the Parthenon Marbles, also has been much discussed in recent publications. Museums have offered defenses of their holdings and point to their important role in educating the public…Moreover, arguments have been advanced for redefinitions of "cultural heritage" on the grounds that the nationalism implicit in the concept is too limiting for the conditions of contemporary culture (pp. 358-359).

Although grounding her discussions in the speeches of Cicero, Miles does not leave us in the ancient past. She makes Cicero's speeches relevant to today's debates over cultural property, reminding us of the complexity of this topic as we reflect on spoils from the Napoleonic wars and other acts of imperial conquest; the horrific plunder of art by the Third Reich during World War II and its reshaping of international laws and relationships; and today's struggles to avoid cultural destruction amid wars on terror, civil unrest, economic development, and tourist activities. Contemporary infrastructures permit objects to flow through the international marketplace more easily than ever before. Miles' book and the other books surveyed here tackle these issues and more, from a variety of perspectives that collectively illuminate the complexity and intrigue permeating the world of cultural property and the law.



LAW, ETHICS AND THE VISUAL ARTS, 5th ed.

John Henry Merryman, Albert E. Elsen, and Stephen K. Urice

Kluwer Law International BV, The Netherlands, 2007. 1,324 pp., hardcover, $352, ISBN 9041125187 softcover, $128, ISBN 9041125175

"... Merryman holds a venerated position in the field of art law. ... Although not a defende of the art trade per se, [he] has made clear his objections to what he describes as cultural nationalism and retentionism."

John Merryman, Professor Emeritus at Stanford Law School, and Albert Elsen, a noted art historian who died in 1995, are known as the trailblazers who launched the first course in art law in 1971 at Stanford University; Merryman holds a venerated position in the field of art law. In this fifth edition of their art law textbook (the first edition appeared in 1979), they are joined by Stephen Urice, an Associate Professor of Law at the University of Miami.

Merryman's book tackles legal and ethical issues in cultural property head-on, thrusting the reader immediately (Chapter 1) into "Plunder, Reparations, and Destruction." Working from past to present, using case studies interspersed with notes and comments, we are led expertly through the labyrinthine legal worlds of military plunder and conquest, throughout which we are provided access to opinions of legal scholars and others written over the course of the 19th and 20th centuries. While this approach may intimidate those opening the book in search of general art law knowledge, it does an excellent job of seizing the reader's attention and highlighting the larger legal picture of the international trade in cultural objects before focusing on the day-to-day issues of life in the art trade. About 400 pages of the 1300-page tome are dedicated to cultural property issues.

Chapter 1 begins with a 1949 U.S. Department of State paper on the protection of art and monuments during war.[4] While this paper and the several other reprinted works give a strong overview of the topic and provide valuable source material for the lay reader, an author's introduction and brief comment prior to these works could add value by introducing the works, commenting on the context for their inclusion, and encouraging focus on particular aspects of the works prior to reading them. Some sections do provide an introduction, such as Chapter 2's "Author's Note" preceding the 1970 UNESCO Convention.[5]

Although not a defender of the art trade per se, Merryman has made clear his objections to what he describes as cultural nationalism and retentionism. Chapter 2, "The International Trade in Art," begins with a statement on the "unfree trade in cultural property." Here the reader is (re)introduced to some of Merryman's well known concepts pertaining to the international movement of cultural objects through the marketplace. The chapter raises the notion of cultural property as an economic resource and compares restrictions on cultural property trade with efforts to expand international trade in other contexts. We are exposed to Merryman's widely recognized trilogy of viewpoints relating to the relationships between and among cultural objects, archaeological contexts, national identity, and humanity's shared interest in the past, coined "cultural internationalism," "cultural nationalism," and "object/context view." The materials in this chapter focus primarily on issues pertaining to works falling in the general category of art rather than antiquities. The case of *Beyeler v. Italy,* involving a dispute over rights to a Van Gogh painting whose export from Italy was denied by the Italian government,[6] raises intriguing and significant questions about efforts by nations to assert cultural rights and

[4] Charles de Visscher, "International Protection of Works of Art and Historic Monuments," U.S. Department of State, Documents & State Papers 821, 823 (June 1949).

[5] *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* (1970).

[6] See Merryman, p. 122, discussing Case of *Beyeler v. Italy,* brought in the European Court of Human Rights (2000).

restrict the trade in certain works. The chapter also discusses the impact of the 1970 UNESCO Convention and its implementing legislation in the United States, the Cultural Property Implementation Act (CPIA)[7], both of which address stolen works of art and illicitly exported archaeological and ethnographic material.

Chapter 3 examines the ethical and legal aspects of the international trade in archaeological and ethnographic objects. Numerous third party articles presenting contrasting views about the causes and effects of the illicit traffic in such objects give the reader an opportunity to consider the complicated nature of the debate. The authors touch on key issues and refer the reader to numerous outside sources for more extensive discussions. The reproduction of ethics codes and statements of principles from museum, archaeological, and dealer organizations provide valuable tools to set the stage for the laws and lawsuits we read about in subsequent pages,[8] although the ethics principles for the Society for American Archaeology,[9] which represents the largest group of archaeologists in the United States, and the code of ethics for the World Archaeological Congress,[10] would be important additions.

Discussion of the law is effectively juxtaposed with ethical principles and codes. We confront nefarious acts of illegal export, theft, and smuggling through the lens of important legal cases not only in the U.S., but in New Zealand, Cyprus, Guatemala, and beyond. The book examines national ownership laws ranging from vague export restrictions to blanket declarations of ownership. Surprisingly, in its section on U.S. legislation, the book fails to present or discuss the two U.S. laws that have governed a large portion of domestic cultural property for the last century: the 1906 Antiquities Act[11] and the 1979 Archaeological Resources Protection Act (ARPA).[12] In the international context, however, Merryman's book provides effective coverage of the efforts of nations to control the movement of objects found within their borders.

In Chapter 4, "Repatriation of Cultural Property," Merryman's book comprehensively and effectively tackles the 200 year-old dispute over the Elgin Marbles, a topic he has engaged in earlier, well-recognized writings. The reader is given the opportunity to participate in the debates held in the British Houses of Parliament in 1816 when Thomas Bruce, 7th Earl of Elgin, offered to sell the Marbles to the British government after removing them from Athens and transporting them to Britain during his tenure as ambassador to the Ottoman Empire. The chapter offers additional case studies from around the globe that demonstrate different legal and political solutions to claims for the return of objects to their nations of origin. Once again, however, the situation in the United States is given a small place at the table. Section 4 of the chapter reproduces the text of the 1990 Native American Graves Protection and Repatriation Act (NAGPRA),[13] a federal law significantly impacting the collections of many U.S. museums and others seeking to acquire Native American antiquities. There is, however, very limited discussion of the law and its impact. Despite this limitation, shared by many of the books surveyed, Merryman's book effectively leads the reader on a vigorous journey through the intrigues of the international cultural property landscape.

"... Merryman's book effectively leads the reader on a vigorous journey through the intrigues of the international cultural property landscape."

7 Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601 et seq.

8 See Merryman, pp. 232–247, with materials from ICOM, AAM, AAMD, CINOA, Sotheby's, British Art Market Federation, and AIA.

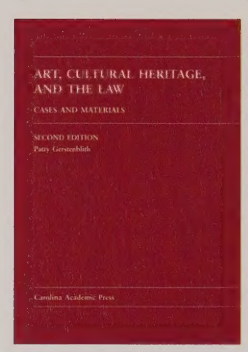
9 See http://sss.org/aboutSAA/committees/ethics/principles.html.

10 See http://www.worldarchaeologicalcongress.org/site/about_ethic.php.

11 Antiquities Act, 16 U.S.C. 431-433 (1906).

12 Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq. (1979).

13 Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq. (1990).



ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS, 2nd ed.

Patty Gerstenblith

Carolina Academic Press,
Durham, NC, 2008
932 pp., hardcover, $110
ISBN 1594600996

Patty Gerstenblith is a law professor at DePaul University and a leading scholar in cultural heritage law. She also holds a doctorate in art history and anthropology and is recognized as an advocate for what might be described as the archaeological viewpoint in the cultural heritage debates. In the recently released second edition of her legal textbook, approximately half is dedicated to the topic of cultural heritage law, arranged in four parts (Chapters 9 through 12): Cultural Heritage in Time of War and in the Aftermath of War; Cultural Heritage in the International Context; Cultural Heritage of the United States; and Exploration and Appropriation of Indigenous Cultures. The book includes an extensive appendix with source documents such as international conventions, federal statutes, and other legislation.

"Gerstenblith's book, more so than Merryman's, covers U.S. domestic cultural heritage, focusing heavily on archaeological issues. . . . All told, . . . [she] devotes more than 500 pages, including appendix materials, to the topic of international and U.S. cultural heritage.

Chapter 9, addressing issues of war and its aftermath, provides an informative historical overview of legal mechanisms developed in efforts to counter the devastation that military action wreaks on buildings, sites, and objects of cultural importance. We are carried from an 1813 decision by a Nova Scotia admiralty court to return works of art taken by the British from the American vessel Marquis de Somerueles, through the 1863 Lieber Code drafted at the request of President Lincoln in a groundbreaking effort to establish codes of conduct for the Union Army with respect to cultural sites and objects, to the 1954 Hague Convention drafted in response to the devastation wrought upon cultural objects and sites during World War II.[14] Gerstenblith provides extensive commentary in notes, which are interspersed with key cases, such as *Menzel v. List,*[15] the first litigated case in the United States involving artwork stolen by the Nazi regime during World War II. The unique impact of World War II on art and cultural heritage has triggered much in the way of international conventions, national legislation, organizational codes of ethics, and litigation. Gerstenblith, like Merryman, provides a strong historical and legal overview of all of these aspects. For those interested in advanced legal doctrines relating to war and the international movement of cultural objects, Gerstenblith provides an in-depth look at two significant cases — *United States v. Portrait of Wally*[16] and *Republic of Austria v. Altmann*[17] — that raise issues such as a foreign nation's immunity from suit in the United States, an art object's immunity from seizure while in the United States, and judicial treatment of foreign laws and treaties affecting claims to objects surfacing in the United States.

In dealing with the broader debates surrounding the international movement of cultural objects, Gerstenblith juxtaposes writings by a number of scholars with divergent perspectives about appropriate handling of cultural objects. She summarizes a key concern of the archaeological community pertaining to the acquisition and movement of cultural objects — the destruction of archaeological sites and what she believes is its root cause:

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14 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954). See also the *Protocol* (1954) and *Second Protocol* (1999) to the Convention.

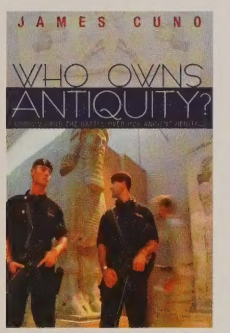
15 *Menzel v. List,* 267 N.Y.S.2d 804 (Sup. Ct. NY 1966).

16 *United States v. Portrait of Wally,* 2002 WL 553532, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 11, 2002). This case has had a complex legal history. For an appellate court ruling on an appeal from a 1999 New York Supreme Court court ruling (177 Misc.2d 985), see *In the Matter of the Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, Appellant. The People of the State of New York, Respondent,* 93 N.Y.2d 729; 719 N.E.2d 897; 697 N.Y.S.2d 538; 1999 N.Y.LEXIS 2856 (1999).

17 *Republic of Austria v. Altmann,* 541 U.S. 677, 124 S. Ct. 2240 (2004).

> "...one of the largest threats to the archaeological heritage is through intentional commercial looting and destruction of sites. Sites throughout the world are looted and monuments dismembered so that objects and architectural fragments can be sold on the international art market. While at the local level looting is fomented by the poverty of local populations, political instability and conflict, the ultimate and considerable market value of these objects is realized primarily by the middlemen and those who sell these objects in Western Europe, the United States, and Japan" (pp. 551-552).

Gerstenblith, like Merryman, discusses and provides excerpts from the 1970 UNESCO Convention and CPIA. She also reproduces the full text of both in the appendix. Gerstenblith's book, more so than Merryman's, covers U.S. domestic cultural heritage, focusing heavily on archaeological issues. She addresses the laws relating to archaeological sites both on land and underwater. All told, in addition to addressing traditional art law topics,[18] Gerstenblith devotes more than 500 pages, including appendix materials, to the topic of international and U.S. cultural heritage. Through a combination of case studies, notes, problem areas, and textual discussion, Gerstenblith's book is an excellent teaching tool — there is even a Teacher's Supplement — for law students or other graduate students studying legal aspects of art and cultural heritage.[19]



WHO OWNS ANTIQUITY?

James Cuno

Princeton University Press, NJ, 2008, 256 pp.
Hardcover, $24.95
ISBN 0691137129

Whereas Merryman's and Gerstenblith's books are essentially comprehensive textbooks on art law and cultural heritage, *Who Owns Antiquity?* is an extended and strongly argued essay on cultural property issues from the vantage point of an American museum director.

Debates about control over cultural property are often cast in terms of anthropologists vs. museums and private collectors.[20] James Cuno, president and director of the Art Institute of Chicago and former director of the Harvard University Art Museums, argues in this, his newest book, for a shift in focus of the debates to the impact of evolving laws on access to objects:

> Let's be clear about this: the argument between art museums and archaeologists is not over whether antiquities and archaeological sites should be preserved. It is over how best to preserve them and increase our knowledge of and public access to them for the benefit of all of us (p. 155).

"... *Who Owns Antiquity?* is an extended and strongly argued essay on cultural property issues from the vantage point of an American museum director."

Although he identifies sites as well as objects in his argument, Cuno's book overwhelmingly focuses on the object. He argues, for example, for a return

[18] Section I covers artists' rights, including freedom of expression, copyright, and moral rights; Section II addresses issues involving museums, art merchants, and art markets.

[19] For another excellent law school textbook focused on cultural property laws in the archaeological context, see Richard B. Cunningham, *Archaeology, Relics, and the Law* (Carolina Academic Press, 2d ed., 2005).

[20] See Merryman, p. 114: "[A]rchaeologists and ethnographers, who put primary emphasis on objects and contexts, blame collectors, museums, and the antiquities trade for providing a market that encourages violation of sites in source nations and for the international black market in archaeological and ethnographic objects."

of the concept of *partage*, institutional funding of archaeological excavations and the sharing between source nations and funding institutions of the objects and information obtained as a result of excavation. This practice, which, he says, "all but disappeared with the flood of national retentionist cultural property laws in the second half of the twentieth century," underpinned the establishment and growth of encyclopedic museums such as the British Museum and the Louvre (p. xxxiii).

"Cuno's eloquent arguments for the value of encyclopedic museums champion collaborative, international efforts to excavate and share objects of antiquity. Nonetheless, his arguments fail to offer solutions to a pressing problem that undergirds much of the debate over cultural property: the presence of unprovenanced antiquities on the market . . ."

Cuno provides in-depth case studies focused on Turkey and China to demonstrate his proposition that nation-based control over antiquities benefits short-term political goals of those in power rather than long-term cultural interests of all peoples. In arguing for a shift away from nationalist repatriation trends, he trumpets the growth of encyclopedic museums as "a counter argument to the prevailing tendency to divide the world," enabling such museums to serve as "a force for understanding, tolerance, and the dissipation of ignorance and superstition about the world" (p. 123).

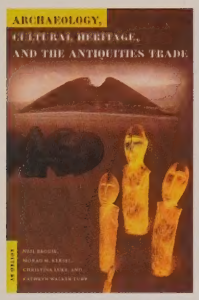
Ownership, legal or equitable, is the basis on which many claims for transfer of possession of cultural property are made. Cuno points out that museums hold objects in trust for the benefit of the public: "They are not in the collections of the art museum for the art museum." He lauds John Merryman's proposed triad of principles — preservation, the quest for knowledge, and access — as guides for the development of future cultural policy.

Cuno's eloquent arguments for the value of encyclopedic museums champion collaborative, international efforts to excavate and share objects of antiquity. Nonetheless, his arguments fail to offer solutions to a pressing problem that undergirds much of the debate over cultural property: the presence of unprovenanced antiquities on the market and what archaeologists — and many others — say is the connection between demand for objects and the looting of archaeological sites. He acknowledges the fact that unprovenanced antiquities raise complicated issues,[21] but in arguing that provenance is, "strictly speaking," one of "ownership and not archaeological status," he proceeds to focus his arguments on how to manage objects, with or without good provenance, once they enter the marketplace. Provenance, in art historical terms, refers primarily to the ownership history of a work, focusing on the chain of title of those who have owned the object as it has passed through the marketplace. It is the question of provenience — information about the 'find spot' or circumstances of discovery and excavation of an archaeological object in modern times — that is the key issue of concern for archaeologists.[22]

Cuno's book challenges assumptions that nation-states, rather than all of humanity, should have a right to claim ownership and control over antiquities. The focus of this book is not on protecting archaeological sites or preserving contextual knowledge. Rather, the book focuses on challenging national claims for the return of ancient objects and convincing the reader that the curation of such objects in the collections of major cultural institutions throughout the world is the most appropriate disposition option for them.

21 Cuno, p. 1: "At the center of the dispute is the question of unprovenanced antiquities."

22 See Gerstenblith, p. 298.



ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE

Neil Brodie, Morag M. Kersel, Christina Luke, and Kathryn Walker Tubb (eds.)

University Press of Florida, 2006
368 pp., hardcover, $65,
ISBN 0813029724 softcover, $29.95,
ISBN 081303339X

In contrast to Cuno's book, *Archaeology, Cultural Heritage, and the Antiquities Trade* is an anthology of 17 articles that focus primarily on the looting of archaeological sites and the illicit trade in antiquities,[23] from the vantage point of archaeologists. The book is one of four volumes in a new "Cultural Heritage Studies" series, whose editor, Paul Shackel, declares in the book's forward (p. ix) that "archaeological sites are being looted at an increasing rate and the illicit antiquities trade is escalating throughout the world." This volume addresses concerns about lack of provenience, and the knowledge lost through destructive, undocumented removal of objects from archaeological sites. It pays less attention to ownership status — provenance — once the object enters the marketplace.

In her piece highlighting the legal trade in Bering Strait ivories excavated by Alaska Native people from their lands on St. Lawrence Island, Julie Hollowell examines assumptions about cause and effect relating to the antiquities marketplace. She argues that data from her case study demonstrate that increasing the supply of legally available goods will not reduce demand, as some argue, but instead feeds into dealers' willingness to sell what is available and the unfailing desire of high-end collectors to acquire new, rare finds.[24]

In his essay, Colin Renfrew, a professor of archaeology at Cambridge, challenges museums to develop clear acquisition policies that support the fight to reduce ongoing looting.[25] He acknowledges that unprovenanced and unprovenienced objects exist in the marketplace, and he suggests creating "repositories of last resort" either to house objects originating within the borders where the repository is located or, in situations of international crisis, to take temporary stewardship of objects until appropriate permanent solutions are developed.

Co-editors Neil Brodie, Director of Cultural Heritage Research at Stanford University's Archaeology Center and formerly Research Director of the now-defunct Illicit Antiquities Research Centre at University of Cambridge, and Christina Luke, an archaeologist at Boston University, conclude the volume by highlighting their view that market demand for objects leads to increased looting of archaeological sites:

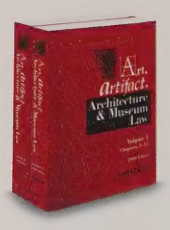
> *". . . Archaeology, Cultural Heritage, and the Antiquities Trade* is an anthology of 17 articles that focus primarily on the looting of archaeological sites and the illicit trade in antiquities, from the vantage point of archaeologists."

The themes expressed in most chapters of this book are remarkably similar: the pillage of archaeological sites and cultural institutions continues, and the antiquities market thrives. On the ground, data from field surveys clearly point to a growing problem of plunder, and the type of material appearing on the open art market correlates to the regions, even sites, that are consistently targeted (p. 303).

[23] For detailed case studies documenting archaeological looting, see Brodie et al. (eds.), *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* (McDonald Institute for Archaeological Research, 2001).

[24] See Hollowell, "St. Lawrence Island's Legal Market in Archaeological Goods," p. 121.

[25] See Renfrew, "Museum Acquisitions and the Illicit Traffic in Antiquities," p. 248.



ART, ARTIFACT, ARCHITECTURE & MUSEUM LAW

Jessica L. Darraby

Thomson Reuters/West,
13th ed. 2008.
Two-volume softcover set, $578
ISBN 9993640204

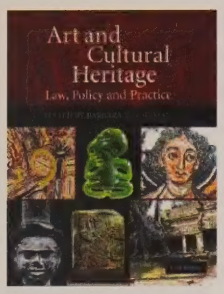
Jessica Darraby's treatise, reviewed by me for *IFAR Journal* in 1998 in a survey of general art law books (as was Merryman's then-current version of his book, surveyed above), has been regularly revised and expanded since then, most recently in July 2008. The new edition, in two volumes, has a change in title to reflect the inclusion of museum law, although there is no specific chapter devoted to it. Darraby is an art law attorney in private practice in California. Her book provides concise, section-by-section commentary on discrete topics, mainly concerning general art law — such as valuation and appraisal; copyright; art fraud; and multiples. Most of the cultural property discussion — the subject of this survey — is contained in Chapter 6, "International Trade," while discussions of U.S.-based cultural property issues are in Chapter 13, "Archaeology and Artifacts."

Darraby raises a question that permeates the surveyed books; namely, "Who owns the past?" Ownership claims can derive from theft victims, heirs, descendant communities, and nations within whose borders objects are discovered. As Darraby points out, the 1970 UNESCO Convention begs the question rather than answering it comfortably, by stating that a nation may have a cultural heritage claim when an object is (i) created by an individual residing within the nation's borders, regardless of the nationality of the creator; (ii) created by a citizen of the nation while residing in a foreign jurisdiction; (iii) found within the borders of the nation; (iv) acquired during authorized 'missions'; or (v) received by exchange, purchase or gift with the consent of the country of origin of the object. Darraby provides an annotated discussion of the 1970 UNESCO Convention and extensively discusses its implementation in the U.S. through the CPIA, with sections focusing point-by-point on statutory provisions, including categories of covered objects, import controls, agreements between the U.S. and source nations, and exemptions from regulation or liability. Charts interspersed with text summarize information for quick review and access, such as key international agreements and descriptions of objects subject to import restrictions under bilateral agreements with the United States.

The question of ownership requires inquiry into a nation's domestic property laws and laws about theft and transfer of title, and it also requires consideration of international concepts such as the doctrine of lex situs, under which participating nations respect the 'law of the place' where a transfer of property occurs, and the Act of State Doctrine, under which the United States will decline to interfere with takings of property by a recognized foreign sovereign within that sovereign's borders, even if the taking violated that sovereign's own laws. Darraby succinctly comments on these and other laws, regulations, and agreements that interlace in the international cultural property realm.

Case law is helpfully summarized in charts which list case name, jurisdiction, type of action, and outcome. This tool alone is a valuable resource for law professors and practicing attorneys in the field. Her section on national patrimony laws fleshes out different nations' efforts to claim authority over archaeological objects within their borders, and she provides welcome discussion and analysis that provides the reader with valuable details enabling a more informed consideration of some key arguments playing out in the law, such as the role of the National Stolen Property Act in recovering objects surfacing in the United States after removal from their countries of origin in contravention of national patrimony laws.

With respect to cultural property originating in the United States, Darraby's book provides a fairly thorough discussion of ARPA although it gives only brief attention to NAGPRA. Otherwise, the book is an excellent resource for those seeking a concise, yet substantive, discussion of key laws and cases. Footnotes contain summaries of various cases, and the text comments on some of the most important case decisions. Volume 2 contains dozens of appendices, including legislative texts, selected IRS publications, and bibliographies. This book is an efficient and valuable reference for professionals in the field.



ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE

Barbara T. Hoffman, (ed.)

Cambridge University Press,
New York, 2006
600 pp., hardcover, $135
ISBN 0521857643

The editor of *Art and Cultural Heritage: Law, Policy and Practice,* Barbara Hoffman, is an attorney in private practice in New York and former Chair of the International Bar Association's Committee on Art, Cultural Institutions and Heritage Law. She is also, as is John Merryman, a member of IFAR's Law Advisory Council. Hoffman aptly describes this book as "a bubbling cauldron of law mixed with ethics, philosophy, politics and working principles" (p. 39). It brings together 71 authors with an impressive diversity of scholarly and geographic expertise. The foundation for the book was a 2001 meeting of the International Bar Association in Mexico, which led to publication of the conference papers as a successful e-book. Subsequently, the e-book was expanded beyond its original, conference-driven Latin American focus, and authors from around the globe contributed to this hard-copy 2006 volume.[26]

Contributions to this 65-essay volume are sorted into ten parts, which cut large swaths both geographically and topically. Latin America, Australia, New Zealand, Iceland, United Kingdom, France, Spain, Cambodia and other geographic areas are discussed. Several works focus on African cultural heritage, an area that is often underserved in publications addressing international cultural heritage issues. In his chapter about African cultural heritage, Professor Folarin Shyllon profiles plunder suffered by Nigeria and that country's use of the UNESCO and UNIDROIT Conventions to seek remedies. Professor Shyllon notes that Nigeria's lack of a national museum (prior to the opening of the Jos Museum in 1952) "facilitated not only the exportation of antiquities but also the destruction or damage of those that were not lost."[27] The role of museums is much discussed throughout the book, both in relation to their role in acquiring illicit objects and also in preserving objects for the benefit of generations present and future. Legal frameworks, both private and public, are discussed by a number of authors in a variety of contexts. Professor Guido Carducci, then Chief of UNESCO's International Standards Section, contributes a chapter that effectively summarizes some complexities of international art law and the interplay of private and public laws across multiple jurisdictions as he probes options for improving legal predictability in international transactions and disputes.[28]

Hoffman's book "is unusual in its breadth of coverage and in the multiplicity of perspectives from around the globe. . . . Each individual contribution stands alone as a chapter; there is no editorial or other commentary."

Hoffman's introductory chapter offers a solid overview of the goals and accomplishments of the book. Further, she provides her own substantive discussions of a number of themes, such as the nature of property rights under different legal frameworks, the harm of illicit trafficking in cultural property, and complexities of repatriation disputes in a post-colonial era. A thorough reading of Hoffman's initial chapter will go a long way in educating the reader about the sweeping landscape on which cultural property disputes, collaborations, and policy-making efforts play out. Her chapter on United States law applicable to international cultural property disputes also gives a thorough overview of key laws and cases.[29]

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[26] One article in both the e-version and the hard-copy was originally published in *IFAR Journal,* Vol. 4, no. 4/Vol. 5, no. 1: Frederic J. Truslow, "Putting the IFAR Cuzco Inventory to Work."

[27] Folarin Shyllon, "The Nigerian and African Experience on Looting and Trafficking in Cultural Objects," p. 138.

[28] Guido Carducci, "The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations," pp. 68-85.

[29] Barbara Hoffman, "International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective," pp. 159-177.

The book's organizational structure is at times unclear. An essay titled "The Role of the Museum in Developing Heritage Policy," for example, is included in Part One, titled "International Legal Tools and Viewpoints," rather than in Part Eight, titled "Museums and Cultural Heritage." Overall, however, the volume's sections maintain general internal cohesion. Part Six includes essays on underwater cultural heritage, and Part Five addresses the impact of mining, energy, infrastructure and related financing tools on cultural heritage. Understandably, the number and breadth of topics makes it a challenge to sort them easily into groups. Many of the chapters are individual case studies, such as the pieces on Old Havana[30] and the Birecik Project in Zeugma, Turkey.[31]

The final two parts of the book may be the most important for shaping future policy on cultural heritage issues. Part Nine offers "innovative solutions and partnerships for natural and cultural heritage conservation." The works in this part describe efforts to resolve some of the intractable challenges of managing interests in cultural heritage, including collaborative efforts between public and private sector groups and structural options such as tax incentives designed to promote heritage preservation.[32] Part Ten concludes the volume with three articles offering ideas for dispute resolution through the use of arbitration and mediation as alternatives to litigation. A contribution by Brooks Daly, Special Counsel to the Permanent Court of Arbitration (PCA) at the Hague, encourages increased use of the PCA as a neutral forum in which to seek equitable resolutions of disputes arising between parties coming from jurisdictions with potentially inconsistent legal structures.[33] Use of arbitration, however, similar to a traditional court, would still empower a third party, rather than the parties to the dispute, to decide the fate of the cultural heritage at issue. The chapter on mediation concisely describes the benefits and limitations of mediation as a dispute resolution tool; notably, its nonbinding nature, confidentiality, and the ability of the parties themselves to control the outcome.[34] A 28-page appendix provides a wealth of resource information, including Internet addresses for many laws, conventions, ethics codes, and bibliographic material. It reproduces the text of just a few documents, including the UNIDROIT Convention, World Bank procedures, and the Code of Ethics for the International Council of Museums (ICOM).

This book is a dense tome of information and perspectives. It is unusual in its breadth of coverage and in the multiplicity of perspectives from around the globe. Certain chapters provide valuable overviews of key issues in the field, which may serve as helpful starting points before digging into the myriad case studies and specific legal analyses scattered throughout. Each individual contribution stands alone as a chapter; there is no editorial or other commentary. This allows the reader to pick and choose which chapters to read, and in which order; it also leaves the reader responsible for extracting the bigger picture. A concluding chapter by Hoffman would have been a welcome finale after the many thoughtful and diverse articles. Nonetheless, the book is a valuable contribution to the literature in this field.

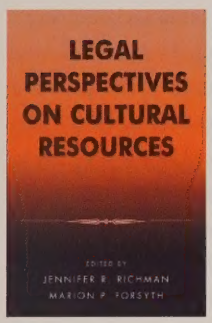
30 María Margarita Suárez García, "Cultural Heritage Legislation: The Historic Centre of Old Havana," pp. 239 – 241.

31 Do an Ya iz, "Tale of Zeugma and the Birecik Project," pp. 255 – 259.

32 María Rosa Suarez-Inclán Ducassi, "Financial Regulations and Tax Incentives with the Aim to Stimulate the Protection and Preservation of Cultural Heritage in Spain," p. 455 – 460.

33 Brooks W. Daly, "Arbitration of International Cultural Property Disputes," pp. 465 – 474.

34 J. Christian Wichard and Wend B. Wendland, "Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry Concerning Traditional Knowledge," pp. 475 – 482.



LEGAL PERSPECTIVES ON CULTURAL RESOURCES

Jennifer R. Richman and Marion P. Forsyth (eds.)

AltaMira Press, Lanham, MD, 2004, 216 pp., hardcover, $80, ISBN 0759104476, softcover, $30.95, ISBN 0759104484

This edited volume, part of a Heritage Resources Management Series, grew out of a symposium in 2002 on the laws relating to cultural resources. It contains a wealth of legal knowledge and archaeological expertise, concisely traversing many of the areas driving the debates over control of cultural property. The editors, Jennifer Richman and Marion Forsyth, are both attorneys; Richman is Assistant Division Counsel for the for the U.S. Army Corps of Engineers and an Adjunct Professor at Lewis & Clark Law School, and Forsyth, an Adjunct Professor at William and Mary College, serves with Patty Gerstenblith (whose book is discussed above) on the Archaeological Institute of America's Cultural Property Legislation and Policy Committee. Several of the 18 contributors to this volume are contributors to the books already discussed, including Gerstenblith, Neil Brodie, and Colin Renfrew.

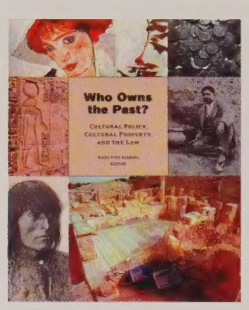
The book is divided into three main sections: Enforcement and Preservation, International Issues, and Repatriation. The Appendix provides extensive information on legal sentencing guidelines for cultural property crimes in the United States. In her overview chapter on "Archaeology and the Law," archaeologist Lynne Sebastian astutely observes that the development and effective implementation of laws in the area of cultural heritage "involve compromises among divergent views and competing agendas" (p. 12). Neil Brodie discusses the concept of export deregulation, pointing to Paul Bator's influential 1983 report, *The International Trade in Art,* as a basis for discussing the difference between export screening controls and complete embargoes on export.[35] Brodie argues that regulation alone, no matter how stringent, will not effectively combat the illicit trade in archaeological material.

The chapter on underwater cultural heritage by Marilyn Phelan and Marion Forsyth is one of the best I have come across to comprehensively yet succinctly examine the international legal mechanisms applicable to underwater sites and structures. Phelan and Forsyth provide an overview of common law admiralty principles, premised on commercial trade and salvage of commodities. More recent legal mechanisms, including the UNESCO Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001, are also analyzed, giving perspectives on efforts to treat underwater sites and objects as cultural heritage embodying historical information and not simply sources of commercial and collectible artifacts.[36] A chapter on archaeology and NAGPRA explores the interaction between ethical principles governing the actions of professional archaeologists and the development of repatriation legislation in the United States.[37] This volume is written to appeal to law and archaeology students as well as to collectors and the larger public.

[35] Brodie, "Export Deregulation," p. 95.

[36] Phelan and Forsyth, "The Protection of Underwater Cultural Heritage," p. 123.

[37] William A. Lovis, Keith Kintigh, Vincas P. Steponaitis, and Lynne G. Goldstein, "Archaeological Perspectives on the NAGPRA: Underlying Principles, Legislative History, and Current Issues," pp. 165 –184.



WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW

Kate Fitz Gibbon (ed.)

Rutgers University Press,
New Brunswick, NJ, 2005
362 pp., hardcover, $34.95
ISBN: 0813536871

Like "Legal Perspectives," *Who Owns the Past?* is an anthology. Unlike it, however, it is not written primarily from the archaeological viewpoint. In addition to two archaeologists, its contributors include lawyers, a museum director, art dealers, collectors, and others. It was published in association with the American Council for Cultural Policy (ACCP), an organization formed in 2002 and now defunct.[38] The book's stated purpose is to work "toward policies that consider traditional American interests in securing cultural resources and respect international concerns over loss of heritage."[39] It is divided into four sections: The Laws, Collecting and the Trade, Art in Peril, and The Universal Museum.

Kate Fitz Gibbon, the book's editor and a former member of the Cultural Property Advisory Committee, argues that "[a]rchaeological organizations have urged changes to U.S. law that would significantly reduce the trade in art, and make it more difficult for museums to preserve access to materials from the world's diverse cultures" (p. xiii). Many, but not all, of the contributions reflect support for maintaining and growing museum collections. Indeed, the editor laments that new laws and policies may "damage America's existing cultural resources and prospects for their future" (p. xiv). The final section of the book, titled "The Universal Museum," concludes with a piece by the ACCP editorial board, which argues for a shift away from current U.S. legal trends recognizing national ownership claims by foreign nations, pressing instead for "strengthening and expanding the role of American museums" (p. 321).

Part I: "The Laws" focuses on legal issues relating to cultural property, and several key legal cases involving international claims for stolen or looted objects take center stage. Egon Schiele's "Portrait of Wally,"[40] the Sevso Treasure,[41] and the Elgin Marbles[42] all receive focused treatment in separate articles. William Pearlstein's article on cultural property laws advocates for expanded applicability of the 1983 Convention on Cultural Property Implementation Act (CPIA) in lieu of the National Stolen Property Act (NSPA) as the legal mechanism for resolving claims to objects in U.S. collections based on foreign national patrimony laws. Pearlstein, an attorney whose clients include dealers and collectors, discusses a number of important cases, including *U.S. v. Schultz,* involving objects smuggled from Egypt, and *U.S. v. An Antique Platter of Gold,* involving a golden phiale imported on behalf of collector Michael Steinhardt from Italy by way of Switzerland, claimed by Italy, and confiscated by U.S. authorities based on customs violations.

The late Steven Vincent's article critiques the Native American Graves Protection and Repatriation Act (NAGPRA), taking an advocacy point of view strongly disfavoring the law. He argues that NAGPRA "is an object lesson in what happens when the American political and legal establishments delve into race and race consciousness, blurring the line between myth and science, the sacred and the profane, while affirming values that are in many ways antithetical to the basis of Western culture" (p. 35). Repeatedly quoting critics of the law, Vincent, a journalist, fails to present or inquire into alternative viewpoints. I found this disappointing, given that his is the only article in the volume to focus on NAGPRA and that a stated goal of the volume is to take "a comprehensive look at the development of U.S. and foreign cultural property law" and "to explain the ethical, legal, and practical arguments on which current U.S. cultural policy is based" (p. xiii). NAGPRA has been controversial and challenging, but many view the law as a tool to address some heinous wrongs of the past and forge new opportunities for collaborative exploration of this country's prehistoric past.

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38 Ashton Hawkins, President of the American Council for Cultural Policy, served as secretary and legal counsel to the Metropolitan Museum of Art.

39 See the book's inside front cover flap.

40 Stephen W. Clark, "The Schiele Matter," pp. 71–82.

41 Harvey Kurzweil et al., "The Trial of the Sevso Treasure: What a Nation Will Do In the Name of Its Heritage," pp. 83 – 96.

42 Kate Fitz Gibbon, "The Elgin Marbles: A Summary," pp. 109 –122.

At the international level of repatriation, Andrew Solomon, a journalist, criticizes repatriation of objects to countries of origin as "dangerous" and "provincial."[43] In his description of the efforts of the director of the Kabul Museum in Afghanistan to facilitate the temporary removal of treasures for safekeeping prior to the commencement of American bombing in Afghanistan, Solomon highlights an important example of a well-intentioned policy failing in its larger mission. UNESCO refused to help, citing its policy against removing art from the source nation. As a result, many irreplaceable objects were destroyed or looted. This startling example of good intentions leading to tragic results should embolden those interested in cultural property preservation to redouble efforts to find opportunities for international collaboration when cultural heritage of any people is in jeopardy.

"Many, but not all, of the contributions reflect support for maintaining and growing museum collections. Indeed, the editor [of *Who Owns the Past?*] laments that new laws and policies may 'damage America's existing cultural resources and prospects for their future'."

In her contribution, Clemency Coggins, an archaeologist credited with raising awareness of the plunder of antiquities in Latin America, describes how carved stone Mayan sculptures (*stelae*) have been destroyed by looters using power saws, chisels, and other tools to crack the stone into pieces and salvage the sculpted faces or other saleable fragments valued on the art market.[44] Many stela fragments have found their way into museums and private collections.[45] She calls for museums to make their acquisition information public, in the hope that such transparency will reduce the acquisition of illicit material and increase knowledge and thus scholarly value in the works.

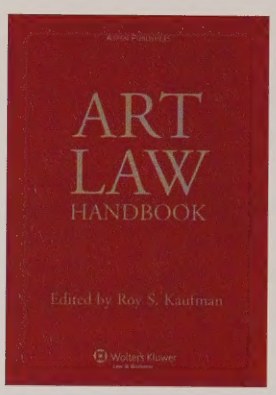
Emma Bunker, an archaeologist specializing in Asia, offers a pragmatic and reasoned perspective on managing antiquities in today's complex, globally-connected environment. She refers to the present as an "Age of Transition between the antiquarian philosophy of the past and the anti-collecting philosophy of today."[46] She astutely points out that the laws and ethics of collecting have changed markedly over the last few decades, leaving many older collectors with collections that have gone from respected to suspect. She applauds collectors and cultural institutions who seek to work with countries of origin to build collaborative relationships and seek creative solutions that demonstrate mutual respect for all parties involved. Overall, Fitz Gibbon's book provides an interesting collection of essays that engage and challenge the reader to consider the status and ramifications of current law and policy, most notably in an effort to consider its impact on the collections of private individuals and cultural institutions within the United States. This book provides important viewpoints by those who are deeply engaged in the art and antiquities markets.

43 Andrew Solomon, "Art in Jeopardy," p. 239.

44 Clemency C. Coggins, "Archaeology and the Art Market," p. 223.

45 As an example, carved stela fragments from the site of El Perú, Guatemala, are in the collections of the Kimbell Museum in Fort Worth and the Cleveland Museum of Art. A stela fragment from the same site was returned by a collector to Guatemala just prior to its auction at Sotheby's in 1999, when an archaeologist familiar with the site raised the issue and the collector voluntarily agreed to return it rather than sell it and risk legal challenge. See "Maya Stela Fragment Returned," www.archaeology.org/online/news/stela.html

46 Emma C. Bunker, "The Acquisition and Ownership of Antiquities in Today's Age of Transition," p. 311.



ART LAW HANDBOOK

Roy Kaufman (ed.)

Aspen Law & Business, 2000; with 2001 and 2004 supplements 1164 pp., hardcover, $279
(Also includes a CD-ROM)
ISBN 0735516413

True to its title as a 'handbook,' Roy Kaufman's edited volume, with contributions by 15 attorneys including himself, provides an easily readable and pragmatic overview of some key aspects of cultural heritage law. The book primarily focuses on general art law, divided into three parts: Artists and Rights, The Business of Art, and Death and Taxes. However, in the second section, The Business of Art, a 58-page chapter is devoted to cultural property. Rena Moulopoulos, formerly senior vice president of compliance for Sotheby's, is the author of the chapter. Kaufman describes her contribution as one of "practical lessons and a wealth of necessary information for those involved in the international trade" (p. xliii). The original volume, published in 2000, was supplemented in 2001 and 2004. The 2004 supplement, in particular, provides additional substantive comments in several areas, notably the 2002 case involving antiquities dealer Frederick Schultz. An unusual and helpful feature of the Handbook is a companion CD-ROM containing electronic versions of many forms and documents included in the text, such as copyright forms, purchase agreements, and export forms.

"True to its title as a 'handbook,' Roy Kaufman's edited volume, with contributions by 15 attorneys including himself, provides an easily readable, fairly brief, and pragmatic overview of key aspects of cultural heritage law issues."

The Cultural Property chapter is divided into many subsections, each quite brief, but extensive footnotes are well worth reading. The bulk of the chapter is devoted to the international movement of cultural property. It includes a succinct, informative discussion of the CPIA, including the role of the Cultural Property Advisory Committee created thereunder and the factors that impact U.S. decisions on agreeing to bilateral or multilateral agreements restricting the importation of certain cultural property from countries of origin. Moulopoulos draws clear and important distinctions between looted archaeological or ethnological materials and property stolen from museums, which are often blurred in discussions about claims for the return of antiquities. Cases involving the CPIA and NSPA are highlighted. European Union laws are also noted, and key components of sample export schemes from around the globe are discussed. Moulopoulos separates examples of international export laws into "unrestrictive," "moderately restrictive," and "restrictive," and she offers pragmatic advice to potential exporters.[47] For a concise introduction to key laws and disputes in the field of cultural heritage, Kaufman's book provides a useful entry point for legal practitioners and non-lawyers alike.

CONCLUSION

As we see in the diversity of viewpoints and approaches contained in this sampling of books on the topic, there will be no unanimity about whether or how to manage the trade in cultural property. Some suggestions for solutions include "finding alternative means of making the artifacts "profitable" for local economies," [48] pressing museums "to adopt ethical acquisitions policies and to establish clear due diligence procedures," [49] and resisting the claims of

[47] As an example, Moulopoulos, p. 429, notes that "[b]oth France and Italy have a requirement that under certain circumstances, the government must pay reasonable compensation to the owner if an export license is denied."

[48] Miles, p. 356.

[49] Brodie and Luke, p. 316.

modern nations to objects of the distant past and, instead, supporting the distribution of antiquities throughout the world "to better ensure their preservation, broaden our knowledge of them, and increase the world's access to them."[50] As we delve into legal complexities, cultural variations, and ethical conundrums, Barbara Hoffman offers sage advice:

> A developing jurisprudence involves law, ethics, and policy considerations often beyond the case at issue. The results of efforts to recover looted art and cultural property either through litigation or other means transcend the issue of the return of such property to the claimant and look toward identifying those values and principles to contribute to a fair and equitable cultural heritage policy.[51]

By educating ourselves on the content and diversity of laws, ethical principles, and cultural nuances impacting the future of works of antiquity, we increase opportunities for productive dialogue and the development of workable solutions to the complex challenges at play.[52] The laws impacting cultural property are both ancient and immediate, the issues are intriguing, and the stakes are high. So...read, think, discuss, and enjoy!

• • •

[50] Cuno, p. 154.

[51] Hoffman, "International Art Transactions and the Resolution of Art and Cultural Property Disputes," in Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, p. 176.

[52] A thoughtful analysis on the distinction between ownership and stewardship in the context of cultural objects is given by Joseph Sax in his book, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press, 1999), reviewed in *IFAR Journal*, Vol. 3, no. 2.

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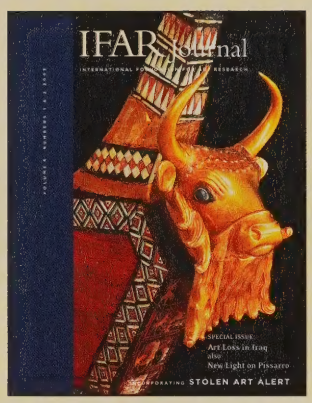

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Most items in this publication are registered in the database of the Art Loss Register, with its New York office at 108 West 39th Street, Suite 506, New York, NY 10018 and its London office at First Floor, 63—66 Hatton Garden, London EC1N 8LE.

The photo of each item is accompanied by a brief description of the work, the ALR catalogue number, if registered, and the date and place of theft. An asterisk before the catalogue number means that a photograph of the stolen work is available, although not necessarily included in this issue.

Anyone wishing additional information should contact the ALR at 212.297.0941.

STOLEN ART

PAINTINGS

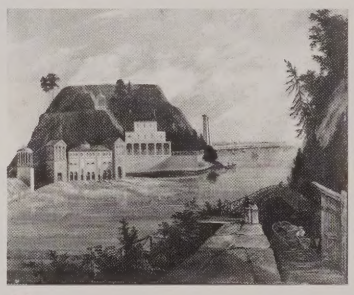
86 *After* **CARAVAGGIO** (Italian, c.1573–1610). ***The Taking of Christ (or The Kiss of Judas),*** c.1573–1602. Stolen from the Odessa Museum of Western and Eastern Art in Odessa, Ukraine sometime between the evening of July 30 and the morning of July 31.

86

87 **FRANK MOSS BENNETT** (English, 1874–1953). ***Out of Luck, 1945.*** Oil on canvas. 50 x 45 cm. *L08.05. Stolen from a private residence in Burton-on-Kendal, Cumbria, England on November 6, 2007.

87

88 **JOHN ARCHIBALD WOODSIDE** (American, 1781–1852). ***Fairmount Water Works,*** 1842. Oil on canvas. *N08.280. Stolen from the Philadelphia Park System in Philadelphia, PA on June 23, 2008.



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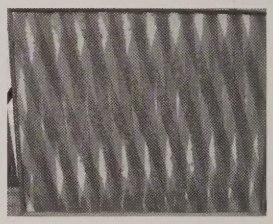
89 **PIERO DORAZIO** (Italian, 1927–2005). ***Seccessione,*** 1963. Oil on canvas. 34 x 42 cm. *L08.029. One of four paintings stolen from the artist's atelier in Todi, Italy on July 25, 2007.



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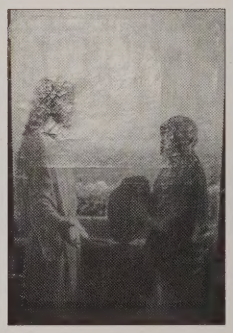
90 **SARAH MARY TILLMAN** (American, 20th century). ***Goddess,*** 1918. Oil on canvas. 60" x 48". *N08.019. Stolen in Beverly Hills, CA on November 27, 1997 after the owner left the painting with a neighbor prior to shipment.

90

91 **GUIDO GREGANTI** (Italian, 20th century). ***Jesus and the Samaritan Woman.*** Oil on canvas. 60" x 36" Signed l/r. *N08.030. Stolen from a private office in West Point, GA on October 25, 2007.



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* Numbering for the year 2007/2008 Cumulative Index of Stolen Art began with the last issue, Vol. 10, no. 1.

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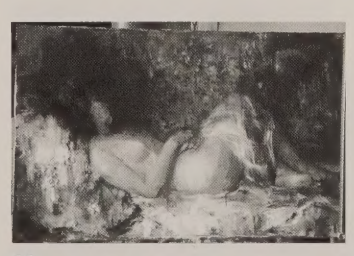

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92 **UNKNOWN.** ***Portrait of William Yuile,*** 1775 (Scottish). Oil on canvas. *N08.021. Stolen from a private residence in Victoria, B.C., Canada on February 1, 2008.

93 **ANTONIO GATTORNO** (Cuban, 1904–1980). ***La Leyenda de Adonaya,*** 1928. Oil on canvas. 50" x 71" Panel. One of a four-panel work. *N08.040. Stolen by the Communist government of Cuba from a private residence in Havana on June 1, 1965.

94 **MARY FEDDEN** (English, b. 1915). ***Still Life Against the Sea,*** 1957. Oil on canvas. 15 ½" x 19 ½". *L08.289. Stolen from a hospital in Birmingham, England.

95 **SERGEY BAZILEV** (Ukrainian, contemporary). ***Soft Parade,*** 2007. Oil on canvas. 120 x 200 cm. *L08.355. Stolen from a London gallery on April 18, 2008.

The following two paintings by **VACHAGAN NARAZYAN** *(Russian, contemporary) were lost in transit in California on January 12, 2008. *N08.068:*

96 ***Knight and Angel,*** 2007. Oil on canvas. 14" x 14". Signed l/r.

97 ***Invitation to Be Our Guest,*** 2007. Oil on canvas. 13 ½" x 11 ½".

The following paintings by **NIKOLAI BLOKHIN** *(Russian, b. 1968) were stolen at Charles de Gaulle Airport in Paris on August 29, 2007 while the artist was en route to a one-man show in the U.S. *N08.080:*

98 ***Harlequin on a Blue Horse,*** 2006. Oil on canvas. 70" x 51". Signed l/r.

99 ***Evening Repose,*** 2006. Oil on canvas. 32" x 50" Signed l/r.

100 *Anya,* 2006. Oil on canvas. 59" x 24". Signed l/l.

101 *Evening Performance,* 2006. Oil on canvas. 47" x 67". Signed l/r.

102 *Still Life,* 2005. Oil on canvas. 16" x 24".

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*The following paintings were stolen from a private residence in Stratford, Ont., Canada on February 5, 2008. *N08.062:*

103 **UNKNOWN.** *Portrait,* 1940. Oil on canvas. 20" x 16".

104 **KEN NUTT** (Canadian, b. 1951). *Snakes and Ladders,* 2007. Watercolor. 30 x 36 cm.

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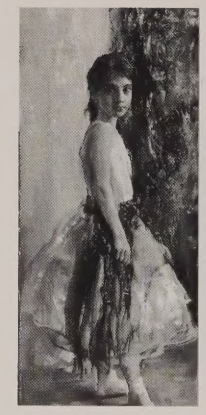
105 **JOHN WILLIAM BEATTY** (Canadian, 1869–1941). ***Winter Sunshine, Bellefountain (Cabin at River's Edge in Winter).*** Oil on canvas. 50.8 x 60.0 cm. *L08.082. Stolen from the Ontario College of Art & Design, Toronto, Canada on January 8, 2007. Interpol no. 2007/11864-1.1

MIXED MEDIA

106 **ROBERT RAUSCHENBERG** (American, 1925–2008). ***Jacob Javits Center,*** 1986. Collage. Unknown medium. 23 x 22 cm. *N08.028. Stolen from a private residence in Palm Beach, FL on September 1, 2007.



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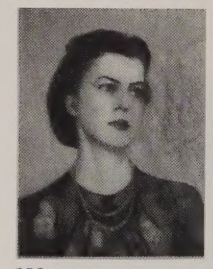

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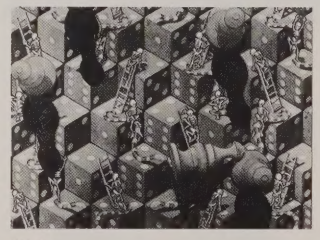

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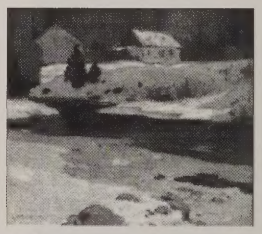

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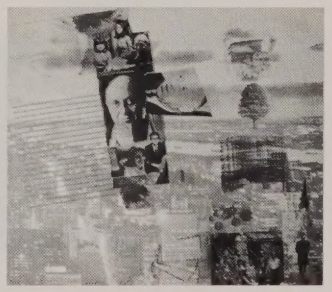

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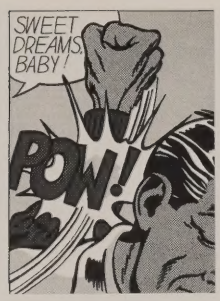

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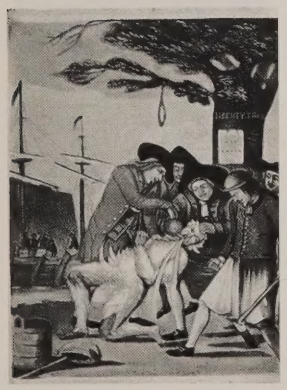

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PRINTS, LITHOGRAPHS

*The following works were stolen from the Lasse Aberg Museum near Stockholm, Sweden on July 18, 2008. *L08.700:*

107 **ANDY WARHOL** (American, 1928–1987). ***Mickey Mouse,*** 1981. See color photo on inside back cover.

108 **ANDY WARHOL** (American, 1928–1987). ***Superman,*** 1981. Serigraph / silkscreen. Signed l/r. 126 x 126 cm. Possible ed. no. 64/200.

109 **ROY LICHTENSTEIN** (American, 1923–1997). ***Crak,*** c.1963-64. See color photo on inside back cover.

110 **ROY LICHTENSTEIN** (American, 1923–1997). ***Sweet Dreams, Baby.*** Serigraph. Signed l/r. Numbered 150/200. 95 x 70 cm.

111 **ROY LICHTENSTEIN** (American, 1923–1997). ***Dagwood.*** Serigraph / woodcut. Signed l/r. Numbered "P. P II". 149 x 107 cm.

112 **WALT DISNEY STUDIOS** (American, 20th century). ***The New Spirit.*** Poster, c.1942. 100 x 70 cm.

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113 **UNKNOWN.** ***Paying the Excise Man (Tarring and Feathering),*** 1774. Engraving on paper. 14 ½" x 11 ¼". *N08.065. Stolen from a private residence in Sandy Hook, CT on March 24, 2008.

114 **PABLO PICASSO** (Spanish, 1881–1973). ***Untitled (La Celestine),*** 1968. Etching on paper. 3 ½" x 4 ¾". Ed. no. 21/30. Bloch #1751. Inscribed 12.8.68II. *N08.102. Stolen from a gallery in New York, NY on May 4, 2008.

115 **MARIAN PARKHURST SLOANE** (American, 1876–1954). ***Serene Valley (Mount Mansfield).*** Oil on canvas. 24" x 30" Signed l/l. *N08.093. Stolen from a gallery in Stowe, VT on February 13, 2008.

PHOTOGRAPHS

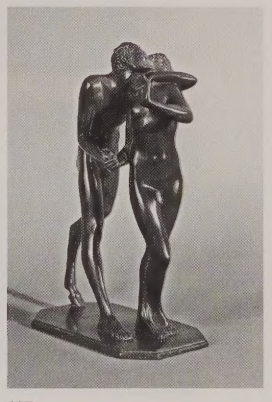
116 **NORMAN PARKINSON** (English, 1913–1990). ***The Beatles,*** c. 1966. Silver print. 10" x 16". Signed l/l. *L08.181. Stolen from a private residence in Isleworth, Middlesex, England on February 18, 2008.

116

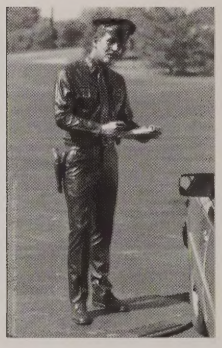
119

SCULPTURE

117 **DIEDERICH W. HUNT** (American, 1884–1953). ***A Satyr Chasing a Nymph,*** c.1914. Bronze. 11 ½" x 9 ¼" x 4 ½". Inscribed on Base: WHD 1914 Roman Bronze Works New York. *N08.238. Stolen from a gallery in New York on May 28, 2008.



117

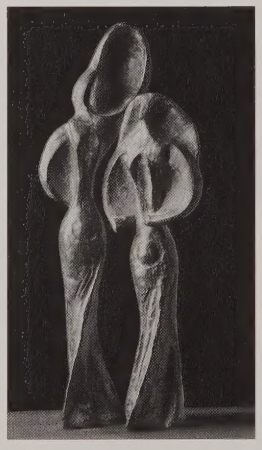


120

118 **PRODOSH DAS GUPTA** (Indian, 1912–1991). ***Dancers,*** c.1969. Bronze. 21" x 6". Ed no. 4/5. *L08.307. Stolen from a private residence in New Delhi, India on March 6, 2008.

119 **KURT KLUGE** (German, 1886–1940). ***Fish Girl,*** c.1934. Bronze. 71 x 40 cm. *C08.029. Stolen on December 1, 2007 from the fountain at the old Botanical Garden in Marburg, Germany.

120 **JOHN SEWARD JOHNSON II** (American, b. 1930). ***Time's Up,*** c.2000. Bronze. Approx. 66" x 22". Artist's proof. Ed. no. 7/7. Depicts a policeman. *N08.489. Stolen from a street corner in Stamford, CT on August 17, 2008.



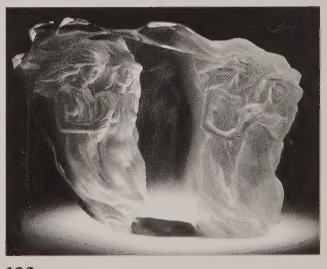
118

121

The following two sculptures by **FREDERICK HART** *(American, 1943–1999) were stolen from a gallery in Sausalito, CA on March 29, 2008. *N08.071:*

121 ***Illuminata II,*** c.1997. Lucite. H: 13".

122 ***Illuminata III,*** c. 1999. Lucite. 17" x 10".

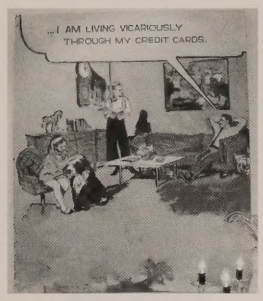


122

MISSING ART

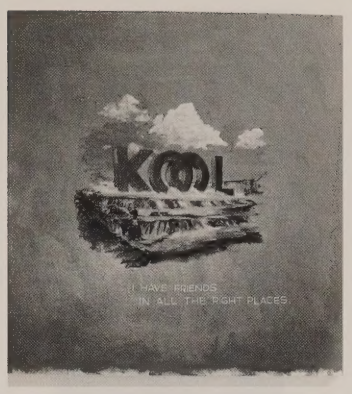
PAINTINGS

The following paintings by **DAVID KRAMER** *(American, contemporary) were reported missing from a gallery in Venice, Italy on April 20, 2008. *N08.115:*



29

29 *Untitled (Vicariously Through My Credit Cards)*, 2007. Oil on canvas. 56" x 48". Signed verso: Kramer 2007.



30

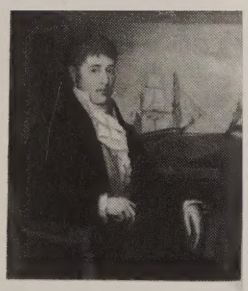
30 *Untitled (All the Right People)*, 2005. Oil on canvas. 49" x 48". Signed verso: Kramer 2005. Labeled from a previous exhibition at Feigen Contemporary, New York.

31

31 *Untitled (Immediate Satisfaction)*, 2005. Oil on canvas. 48" x 46". Signed verso: Kramer 2005. Labeled from a previous exhibition at Feigen Contemporary, New York.

32

32 **SIDNEY JONES** (English, 20th century). *Dancer,* 1939. Oil. 4" x 2". *N08.038. Lost in transit in the U.S. (possibly in Texas) on March 27, 2006.



33

33 **DANIEL P. HUNTINGTON** (American, 1816–1906). *Captain James Day.* Oil on canvas. 48" x 36". *N08.029. Lost in transit in New Hampshire on November 6, 2007.

34

34 **ELENA CLIMENT** (American, b. 1955). *Three Green Parrots,* 1993. Approx. 71 x 92 cm. Signed l/r. *N08.026. Lost in transit on October 26, 2006.

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*The following two paintings have been missing from a hospital in London, England since July 2, 2007. *L08.298:*

35

35 **ALEXANDRA ZWARENSTEIN** (contemporary). *A View of Stamford Brook,* 1976. Oil on panel. 12 ½" x 22".

36

36 **RICHARD FERGUSON** (contemporary). *Italian Orange Villa,* 1991. Oil on canvas. 19" x 28".

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* Numbering for the year 2007/2008 Cumulative Index of Missing Art began with the last issue, Vol. 10, no. 1.

37 **BRENT MERCER** (American, contemporary). ***Tri-Planular Evolution,*** 1980. Acrylic on canvas. 4" x 4". *N08.018. Missing from a private residence in Fresno, CA since June 1, 1997.

38 **UNKNOWN** (English, 18th century). ***James Fremaux,*** 1750. Oil on canvas. 36" x 24". *L08.101. Missing from a private residence in London, England since April 15, 1983.

39 **MICHAEL SCOTT** (English, 1905–1989). ***Natural Form.*** Oil on panel. *L08.294. Missing from a hospital in Liverpool, England since July 2, 2007.

40 **ALEX COUWENBERG** (American, contemporary). ***Imperial,*** 2006. Acrylic on canvas. 72" x 66". *N08.066. Lost in transit between New York and California on February 21, 2008.

41 **PIERO PIZZI CANNELLA** (Italian, b. 1955). ***Suspended for Love,*** 1984. Oil on canvas. 106 ½" x 53". *N08.056. Lost in transit in New York City on January 1, 1996.

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*The following paintings were lost in transit between Mexico City and Miami, FL on January 10, 2007. *N08.043:*

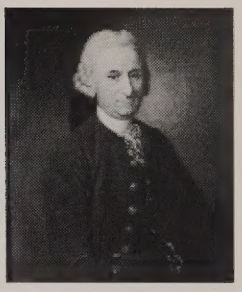
42 **EDUARDO ABELA** (Cuban, 1889–1965). ***Fruit Plate.*** Oil on wood. 44 ½" x 49 ½".

43 **CARLOS ENRIQUEZ** (Cuban, 1901–1957). ***Cuban Fantasy.*** Oil on canvas. 62.5 x 48.0 cm.

44 **JESUS ESCOBEDO** (Mexican, b. 1917). ***Landscape with Palm Trees and Goats.*** Oil on canvas. 70.5 x 55.0 cm.

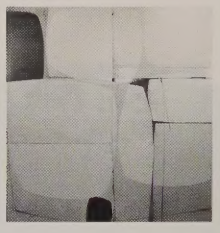
45 **GILL GARCIA** (Cuban, 20th century). ***Hut.*** Oil on canvas.

37



38

39



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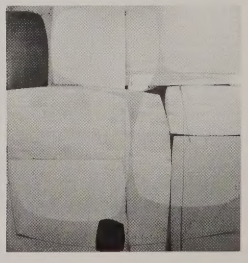


44

45

46

47

46 **LEOPOLDO ROMANACH** (Cuban, 1862–1951). ***Academic Figure.*** Oil on canvas. 67 x 35 cm.

47 **LEOPOLDO ROMANACH** (Cuban, 1862–1951). ***Lady with Fan.*** Oil on canvas. 96.5 x 75.0 cm.

The following two paintings by **DON RAY** *(American, b. 1924) have been missing from a New York gallery since January 1, 2001. *N08.002:*

48 ***Horseman on Fire / Rodeo Rider,*** 2000. Acrylic on canvas. 37 ½" x 34 ½". Recto: DARay-00.

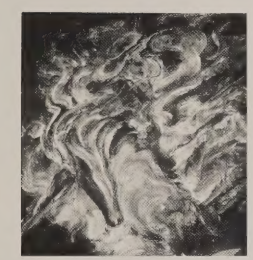
49 ***Dream Becomes Reality / Rodeo Calf Roper,*** 2000. Acrylic on canvas. 37 ½" x 34 ½". Recto: DARay-00. Verso: Title and artist's cat. no. 358.

The following two paintings by **SARAH SPENCER** *(English, contemporary) were lost in transit in Whitstable, Kent, England on February 13, 2008. *L08.206:*

50 ***Blean Woods in Snow,*** 2008. Oil. 21 x 28 cm.

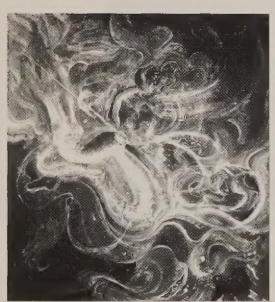
51 ***Looking Back at Whitstable,*** 2008. Oil. 15 x 20 cm.

52 **FERNAND LÉGER** (French, 1881-1955). ***Woman and Child, 1921.*** See color photo on inside back cover.



48

50

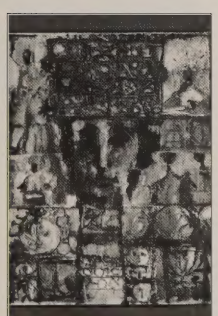


49

51

ICONS

53 **RENÉ PORTOCARRERO** (Cuban, 1912–1986). ***Virgin (Woman).*** Oil on panel. 57.0 x 44.5 cm.*N08.043. Lost in transit between Mexico City and Miami, FL on January 10, 2007. See also item nos. 42-47 above and 55.



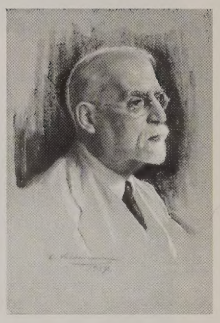
53

WORKS ON PAPER

54 **ROBERT BURNS** (Scottish, 1869–1941). ***Nude Study of the Artist's Wife.*** Sanguine on gray paper. 38.1 x 26.0 cm. Signed l/r.*L08.235. Lost in transit in London, England on January 1, 2006.

54

55 **ESTEBAN VALDERRAMA** (Cuban). ***Portrait of an Older Man, 1937.*** Chalk on paper. 63 x 48 cm. *N08.043. Lost in transit between Mexico City and Miami, FL on January 10, 2007. See also item nos. 42-47 and 53 above.



55

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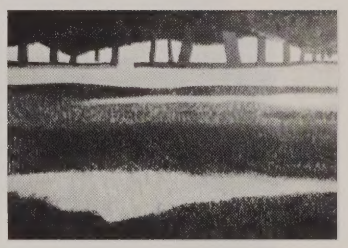
*The following two works were reported missing from hospitals in England in early 2008. *L08.294:*

56 **MICHAEL SCOTT** (Scottish, 1946–2006). ***Knavesmire II.*** Acrylic on paper. 25" x 29".



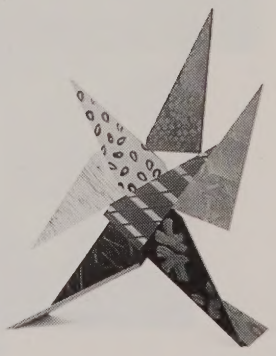
56

57 **JUDY BURNETT** (British, contemporary). ***River in Flood.*** Oil pastel. 16" x 22".

57

SCULPTURE

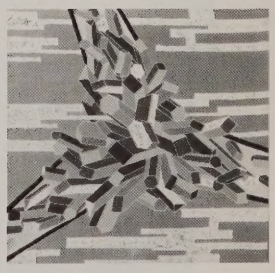
58 **GLORIA GARFINKEL** (American, contemporary). ***Hanabi #2,*** c.1994. Aluminum maquette with acrylic paint. 21" x 17" x 4". *N08.060. Reported missing from the artist's New York studio in early 2008.



58

PRINTS

59 **MARIA KALISA** (contemporary). ***Flying Cubes.*** Batik print. 28 ½" x 27 ½". *L08.294. Missing from a hospital in Liverpool, England on July 2, 2007.



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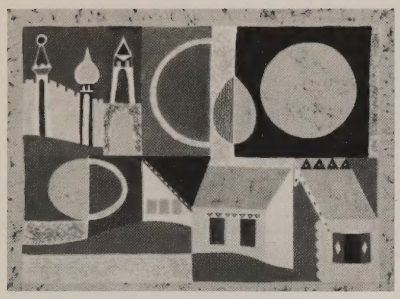
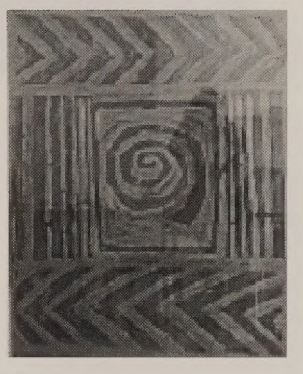


60



61

62A

62B

62C

62D

*The following prints were reported missing from hospitals in England in early 2008. *L08.294:*

60 **MARIA KALISA** (contemporary). ***Russian Village.*** Batik print. 29 ¾" x 39 ¾".

61 **KATE WHITEFORD** (Scottish, b. 1958). ***Double Chevron and Spiral,*** 1989. Print on paper. 48" x 38". Ed. no. 102/250.

PHOTOGRAPHS

62 **JOE ROSENTHAL** (American, 1911–2006).

*Shown below are four of the more than 8 Iwo Jima Battlefield contact photos, dated 1945 (black-and-white, 4" x 6"), from the photographer's personal collection, that have been missing from the Intrepid Museum in New York since October 1, 2006. *N08.086:*

A) ***Marines Raising the American Flag.*** Black-and-white. 4" x 6".

B) ***Flamethrower 1.*** Black-and-white. 4" x 6".

C) ***Flamethrower 2.*** Black-and-white. 4" x 6".

D) ***Rockets.*** Black-and-white. 4" x 6".

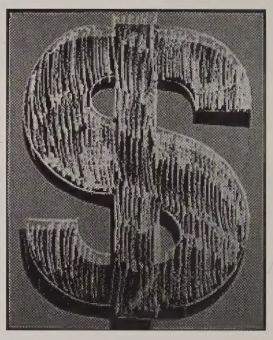
RECOVERED ART

PAINTINGS

18 **BERNARDINO LUINI** (Italian, 1481—1532). ***Depicting Jesus Teaching.*** Oil and gilt (?). 14" x 12". *L08.500. Stolen from a church in Dyfed-Powys, Presteignd, Wales on May 15, 2008. Recovered by local police in early June 2008.

18

19 **ANDY WARHOL** (American, 1928—1987). ***Dollar Sign,*** 1981. Paint and silkscreen on canvas. 20" x 16".*N98.78. Stolen from a New York gallery on February 14, 1998. Recovered with the help of the ALR in September 2007.



19

WORKS ON PAPER

20 **ANDREW WYETH** (American, b. 1917). ***A Bridge, Race Gate (Chadds Ford, PA),*** 1984. Watercolor on paper. 14" x 22". Signed l/r. Stolen from a private residence in Houston, TX in December 2000. Recovered with the help of the ALR in June 2008.

20

21 **MARIO CARREÑO** (Cuban, 1913–1999). ***Tres Mujeres.*** See color photo on inside back cover.

The following two works by **PABLO PICASSO** *(Spanish, 1881-1973) were among four items stolen during an armed robbery from the Estacao Pinacoteca Museum in Sao Paulo, Brazil on June 12, 2008 (*N08.205). The two other items, a* **EMILIANO DI CAVALCANTI** *painting* ***Women in a Window*** *and a* **LASAR SEGALL** *print* ***Couple,*** *were recovered by Brazilian police from under he bed of a suspect during his arrest on August 6, 2008:*

21

22 ***Painter and His Model,*** 1963. Aquatint on paper. 37.5 x 49 cm. Recovered on July 18, 2008 when a suspect was arrested for an unrelated offense.

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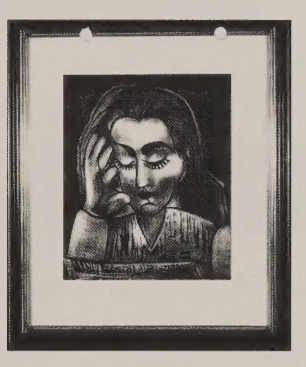
* Numbering for the year 2007/2008 Cumulative Index of Recovered Art began with the last issue, Vol. 10, no. 1.

23

24

25



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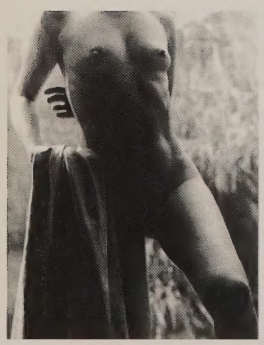

28

23 *Minotaur, Drinker and Women,* 1933. Etching on paper. 29.5 x 36.5 cm. Recovered on August 15, 2008 by Brazilian police after it was abandoned in woods next to a highway near Sao Paulo.

24 **WILLIAM CONOR** (Irish, 1881–1968). ***Going Home.*** Crayon drawing. Signed u/r. *L08.698. Stolen from a gallery in Belfast, Ireland on June 1, 2008. Recovered after the thief offered the work for ransom back to the gallery in July 2008.

The following two etchings by **PABLO PICASSO** *(Spanish, 1881–1973) were stolen from a gallery in Palm Beach, FL on May 22, 2008 (*N08.097). **Le Repas frugal** was recovered in July with the help of the ALR after the thief tried to sell the work to a California dealer. Aided by fingerprints on the packing material in which the suspect shipped the work to California, police traced him to Miami, where they arrested him at his home in early September and recovered **Jacqueline Reading.***

25 ***Le Repas frugal,*** c.1904. Drypoint etching on Japan laid paper. Approx. 60 x 47 cm. Unnumbered, ed. of 29. Signed in pencil.

26 ***Jacqueline Reading,*** c.1964. Linocut. Ed. no. 21/50. Bloch no. 1181. Approx. 25 ¼" x 20 ¾". Signed in pencil. *N08.097.

PHOTOGRAPHS

*The following two items were among numerous photographic silver prints (c.1920) stolen from a New York gallery in 2008 (*N08.027). They were recovered in April 2008 after the woman who had taken them handed them back to the gallery owner:*

27 **EDWARD HENRY WESTON** (American, 1886–1958). ***Carving of Christ in the Garden of Olives,*** 1920. Silver print. 2" x 3". One of several photos by the artist stolen.

28 **MANUEL ALVAREZ BRAVO** (Mexican, 1902–2002). ***Untitled (Woman Holding a Towel),*** c.1980. From the Series *"Diez Desnudos."* Platinum print. 10" x 8". One of several photos by the artist stolen.

RECOVERED ART

NATIVE AMERICAN ART

The following two items are among 12 works of art by Haida artist **BILL REID** *(Canadian, 1920-1998) and three pieces of gold Mexican jewelry that were stolen from the University of British Columbia's Museum of Anthropology in Vancouver, Canada on May 23, 2008 (*N08.107). All 15 items have been recovered. Shown below are two of the 13 items recovered by the Canadian police from two separate residences outside Vancouver on June 7-8. Two additional objects by* **BILL REID***—a carved argillite pipe and a gold eagle brooch — were later found in two sepa rate searches on July 23 and August 11. During the theft a piece of the pipe was broken off, and the Mexican jewelry was heavily dam aged.*

30

29 ***Bracelet,*** c.1962. See color photo on inside back cover.

30 ***Cufflinks,*** c.1965. Ivory and gold. Museum access. no. A2622.

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  Vol. 4, 2001, nos. 1–3, $10 per issue; vol. 4, no. 4 / vol. 5, no. 1 (proceedings of the 9/11 symposium, double issue), $20;
  Vol. 5, nos. 2–4, $10 per issue
  Vol. 6, nos. 1 & 2, $15 (Iraq looting, double issue); no. 3; no. 4, $10 per issue
  Vol. 7 nos. 1 & 2, $10 per issue (no. 2 features: *Authenticity Issues in Photography; Art Loss in Iraq—An Update*);
  nos. 3 & 4, $15 per issue
  Vol. 8 nos. 1 and 2, $10 per issue, nos. 3&4 (proceedings of the catalogues raisonnés conference, double issue), $25.
  Vol. 9, nos. 1 and 2, $10 per issue; nos. 3&4 (features Art Insurance, double issue), $15
  Vol. 10, no. 1, $10; no. 2, $15

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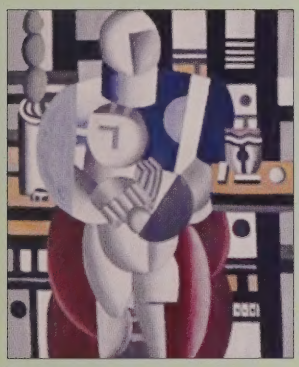
107

109



52

21

29

STOLEN ART

107. **ANDY WARHOL** (American, 1928–1987). *Mickey Mouse,* 1981. Serigraph / silkscreen, 1981. Signed l/l. 126 x 126 cm.

109. **ROY LICHTENSTEIN** (American, 1923–1997). *Crak,* c.1963-64. Offset lithograph. Signed/marked "AP" l/r. 50.5 x 72.2 cm.

MISSING ART

52. **FERNAND LÉGER** (French, 1881–1955). *Woman and Child,* 1921. Oil on canvas. 25 5⁄8" x 21 ¼". *N07.308. Missing from the Davis Museum, Wellesley College in Wellesley, MA. The painting had been loaned to a museum exhibition in Oklahoma in 2006. After it was shipped back to the Davis Museum, it remained stored in its crate because of ongoing renovations. The crate was discovered missing in November 2007 and might have been discarded.

RECOVERED ART

21. **MARIO CARREÑO** (Cuban, 1913–1999). *Tres Mujeres.* Gouache on paper. *N93.472. Stolen from a New York law firm in October 1993. Recovered with the help of the Art Loss Register in May 2008.

29. **BILL REID** (Canadian, 1920–1998). *Bracelet,* c.1962. Gold. Museum access. no. Nb1. 719. One of fifteen decorative objects stolen from a museum in Vancouver, B.C., Canada on May 24, 2008 that were recovered by Vancouver police on June 7–8, 2008. *N08.107. See also Recovered item no. 30, this issue.

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